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Supreme Court, U.S.
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# In The
# Supreme Court of the United States

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PRISMA ZONA EXPLORATORIA
DE PUERTO RICO, INC.,

*Petitioner,*

v.

SILA M. CALDERON, ET AL.,

*Respondents.*

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**On Petition For A Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The First Circuit**

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## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

The First Circuit's decision cannot be reconciled with the precedent of this Court regarding the standard to apply when confronted with the factual allegations set forth in the Verified Amended Complaint and its attached exhibits. The First Circuit's conclusion that Petitioner was not entitled to a hearing on its claims that it was denied funding based on its exercise of its First Amendment rights of free association incorrectly applied the relevant contract law and misread the factual allegations.

The first question presented is whether it was clear that Petitioner could not obtain relief under any set of facts that could be proved consistent with the allegations of the Verified Amended Complaint and the accompanying exhibits pursuant to Fed. R.Civ. P.8(a), 56. *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 508 (2002).

Contrary to the established precedent of this Court, *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986), the First Circuit Court of Appeals rejected material uncontested facts determinative of the outcome of the case. Tellingly, the First Circuit characterized the decision to deny funding to Petitioner as "turn-about is fair play" because according to the Court of Appeals, Petitioner "seems to think" that political affiliation criterion "is fine for selection but not for de-selection." To the contrary, Petitioner specifically alleged that party affiliation was not considered in naming the initial Board members, which resulted in a Board with members from different parties and members who were not affiliated with any party.

## QUESTIONS PRESENTED - Continued

The second question presented is whether the First Circuit's opinion is consistent with *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986).

The Circuits are split on the question of whether the First Amendment protects independent contractors without a formal contract, but with a pre-existing commercial relationship. *Cf. Board of County Commissioners v. Umbehr*, 518 U.S. 668 (1996). In the instant case, the First Circuit held that although petitioner alleged that its Board members and executive director were selected without regard to their political affiliation, the incoming administration was permitted to use political affiliation as a criterion for selection for Board members or employees and for the elimination of the funding of the entire project, a Children's Museum. First Circuit does not define how the operation of a children's museum implicates party affiliation. Like the operation of casinos, the instruction of law enforcement officers, the provision of tow truck services, or the operation of a health care facility, the operation of a children's museum should not be determined by partisan politics. *Lac Vieux Desert Band v. Michigan Gaming Control Board,* 172 F.3d 397 (6th Cir. 1999); *Kinney v. Weaver*, 301 F.3d 253 (5th Cir. 2002); *Lucas v. Monroe County*, 203 F.3d 964, 972 (6th Cir. 2000); *Mangiere v. DCH Health Care Authority*, 304 F.3d 1072 (11th Cir. 2002).

The third question presented is whether independent contractors with a pre-existing relationship with government, but no formal contract, can be denied First Amendment protection based solely on the amount of the contract.

## PARTIES TO THE PROCEEDINGS

PRISMA ZONA EXPLORATORIA DE PUERTO RICO, INC., Petitioner

HON. SILA MARIA CALDERON, personally and in her official capacity as Governor of Puerto Rico and as President of the Children's Trust Fund; JUAN AGOSTO-ALICEA, personally and in his official capacity as President of the Government Development Bank of Puerto Rico and as Vice-President of the Children's Trust Fund; JORGE PESQUERA, personally; MILTON SEGARRA-PANCORBO, personally and in his official capacity as Executive Director of the Puerto Rico Tourism Company; JOSE V. PAGAN, personally and in his official capacity as Executive Director of the Children's Trust Fund; THE CHILDREN'S TRUST FUND; GOVERNMENT DEVELOPMENT BANK FOR PUERTO RICO; JOHN DOE; GEORGE DOE; JANE DOE, Respondents.

## CORPORATE DISCLOSURE STATEMENT

Petitioner PRISMA ZONA EXPLORATORIA DE PUERTO RICO, INC. is a private, non-profit corporation pursuant to Section 501(c)(3) of the Internal Revenue Code that has no parent corporation and is not authorized to issue stock.

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## PETITION FOR A WRIT OF CERTIORARI

Rullán & Buxó, PSC, and Law Offices of Jane Becker Whitaker, PSC in representation of Prisma Zona Exploratoria de Puerto Rico, Inc. (Petitioner), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

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## OPINIONS BELOW

The opinion of the court of appeals (App., infra, 1a-17a) is reported at 310 F.3d 1 (1st Cir. 2002). The opinion of the district court (App., infra,18a-33a) is reported at 162 F.Supp.2d 1 (D.P.R. 2001).

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## JURISDICTION

The judgment of the court of appeals was entered on October 16, 2002. A petition for rehearing was denied on November 22, 2002. App., infra, 34a-35a. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254(1).

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## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in part that "Congress shall make no law * * * abridging the freedom of speech." This Court has long held that freedom of speech encompasses freedom of association for the purpose of engaging in political speech, a core value of the First Amendment. *NAACP v. Alabama*, 357 U.S. 449 (1958).

The Fifth Amendment to the United States Constitution provides in part that "No person shall be * * * deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the United States Constitution provides in part that " * * * No State shall * * * deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 31, Laws of Puerto Rico, Annotated (LPRA), section 3262 provides: "Proofs [of an obligation] may be given by instruments, by confession, by the personal inspection of the court or judge, by experts, by witnesses, and by presumptions."

Title 31, Laws of Puerto Rico, Annotated (LPRA), section 3391 provides: "There is no contract unless the following requisites exist: (1) The consent of the contracting parties. (2) A definite object which may be the subject of the contract. (3) The cause for the obligation which may be established."

Title 31, Laws of Puerto Rico, Annotated (LPRA), section 3451 provides: "Contracts shall be binding, whatever may be the form in which they may have been executed, provided the essential conditions required for their validity exist."

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## STATEMENT OF THE CASE

The District Court had jurisdiction under 28 U.S.C.A. §§ 1331, 1343 and 1367, under 42 U.S.C.A. § 1983, and the First, Fifth and Fourteenth Amendments of the United States Constitution. The Court of Appeals for the First Circuit had jurisdiction under 28 U.S.C.A. § 1291.

Petitioner, a private, non-profit corporation, filed an action against the named government officials and institutions seeking the performance of contractual obligations between Respondents and Petitioner to complete the construction of and continue operating a Museum for the children of Puerto Rico. App. 36a-101a. Respondents, members of a new Administration of an opposing political party, sought to obtain partisan control of Petitioner's Board of Directors and the chief executive position and refused to honor the grant because of the political associations of the Executive Director of Petitioner and some of its Board members in violation of the First, Fifth and Fourteenth Amendments of the U.S. Constitution. App. 91a-93a.

The legal principles under which Petitioner based its contractual claim are clearly settled. "Puerto Rico law establishes that: There is no contract unless the following requisites exist: (1) the consent of the contracting parties. (2) A definite object, which may be the subject of the contract. (3) The cause for the obligation which may be established. 31 LPRA § 3391." *Marrero-García v. Irizarry*, 33 F.3d 117, 122, n.4 (1st Cir. 1994). There are no formal requirements for a contract's validity.[1] First Circuit and Puerto Rico Supreme Court case law are of one voice in favor of Petitioner. Respondents did not address nor challenge either the authorities, nor Petitioner's argument before the First Circuit. The First Circuit found no fault with the authorities, but found that material terms of the contract had not been negotiated. A brief statement of the relevant facts follows.

Puerto Rico has two major political parties, the New Progressive Party (NPP) and the Popular Democratic Party (PDP). The former advocates statehood; the latter supports the status quo. For nearly forty years, these parties have alternated governing Puerto Rico. This case involves a project, unrelated to status or ideological concerns, initiated during the second year of a two term (eight year) NPP administration, and the attempts by the PDP administration to deny funding to the private corporation (Petitioner) that owns the project, explicitly based on the political affiliation of executive director and the Board members. App. 44a, 72a. For six years, the NPP administration worked to build an interactive Museum for Puerto Rico's children. App. 44a-48a. The NPP's intent was to have the Museum in the hands of a private, non-profit corporation, free of partisan politics. App. 48a, 66a. The funding came from Puerto Rico's share of the lawsuits between several states and the tobacco companies, disbursed from the Children's Trust Fund. App. 48a.

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[1] *See* 31 LPRA § 3262 ("[p]roofs [of an obligation] may be given by instruments, by confession, by the personal inspection of the court or judge, by experts, by witnesses, and by presumptions.") (Official Translation 1998); § 3451 ("[c]ontracts shall be binding, *whatever may be the form in which they may have been executed*, provided the essential conditions required for their validity exist.") (emphasis supplied).

Petitioner was incorporated in 1999 as a non-profit private corporation. App. 49a. The incorporators asked the then Governor to appoint the members of the Board. App. 66a. The Governor appointed prominent citizens of Puerto Rico, without regard to their political affiliation. App. 66a. Some board members were affiliated with the NPP, others with the PDP and still others were unaffiliated.[2]

While this was occurring, the government had commenced the design and preliminary construction of the Children's Museum. App. 45a, 46a, 50a, 66a, 68a. When the CTF issued a request for proposals to be funded, hundreds of proposals were received and evaluated. App. 66a,76a. Petitioner's proposal for funding to acquire the Children's Museum, complete its construction and for seed money to operate it, was one of them. *Id.* Seven governmental proposals were accepted for funding as well as ninety-nine private ones, including Petitioner's proposal. App. 76a. The CTF's Regulations state that all grants are final. App. 67a, 91a.

The CTF sent Petitioner a formal letter indicating that its proposal had been accepted by the CTF and asking Petitioner to indicate its acceptance of the grant. App. 67a.

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[2] Petitioner corroborated its allegations by submitting to the Court of Appeals, before its decision was issued, a newspaper report from one of Puerto Rico's three major newspapers, that indicated that one of the Board members initially appointed to Petitioner's Board is the owner of the building where the PDP central offices are located and to whom the PDP owed more than $900,000.

The letter indicated that approval was subject to a review of some of the proposal's details and the finalization of the Service Agreements (containing "the details on the procedures for the disbursement of funds"). *Id.* Petitioner indicated its acceptance and the "Contract" was formed. *Id.*

With this funding and before the Service Agreements were negotiated, much less executed, Petitioner purchased from Respondents all of the Children's Museum's assets, paying nearly ten million dollars from its CTF grant. App. 67a. Puerto Rico's Attorney General and the Boards of the entities involved approved the transaction. *Id.* Construction continued. Meanwhile, a PDP government was elected. App. 69a.

Before the inauguration of the new Governor, Petitioner and the CTF negotiated the Service Agreements. App. 64a. Since the same agreement would be used for the other 99 private grantees, the CTF took the opportunity to prepare a model contract for all grantees. *Id.* Petitioner submitted two agreements, one for capital expenditures, another for operational funding. *Id.* Petitioner made minor changes to the standard agreement to adapt it to its particular situation and returned them to the CTF. *Id.* At that time, the parties had agreed to the terms of the Service Agreements. *Id.*

The only terms contained in the Service Agreement and that had not been incorporated by reference in the Contract were: (1) that funds be used "prudently"; (2) that the "necessary" quotes would be obtained; (3) that checks would be issued, monthly, in the supplier's name; (4) that two quotes be obtained for purchases over $5,000.00; (5) that the CTF approve publicity concerning the use of grant funds; and, (6) the integration, separability and applicable law provisions.[3] The Service Agreements were never signed. App. 64a.

Two weeks after the PDP administration took office, a meeting was held among the President of Petitioner's Board, another member of Petitioner's Board, and one of the Respondents, Mr. Agosto-Alicea – Vice-President of the CTF's Board. App. 70a. During the meeting, Petitioner requested that the grant funds continue to be disbursed and that contractors be paid the money they were owed. App. 70a-71a. Mr. Agosto-Alicea stated he had no objection to the Children's Museum, but he wanted an audit. App. 71a. Mr. Agosto-Alicea added that, regardless of the results of the audit, the final decision of whether to disburse funds would be made by the Governor. *Id.*

After finishing the conversation on the merits of the project, Mr. Agosto-Alicea said "Well [ ], let's talk about another thing now". "You[r] Executive Director, [ ] was assistant to [the former First Lady and] she is married to [the] former Secretary of the [NPP]; and that is a problem." App. 72a. He also stated that he understood the Museum's Executive Director's position to be a political one and that the decision about who would occupy it would come from the new Governor. *Id.* Upon learning of three vacancies on Petitioner's Board, Mr. Agosto-Alicea said he thought it would be fair if the incoming Governor filled the vacancies and said he would provide the names of proposed Board members. App. 72a-73a. The next day, Agosto-Alicea called Petitioner, and provided three names. App. 73a.

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[3] The First Circuit found that the parties had not agreed upon "material terms" of the contract. App. 11a. Two of those purportedly left "open" were established by law, and the third, the amount of the grant had to be set forth in the grant itself. The Circuit Court tacitly admits the latter by including the grant amounts, $60 million for capital expenditures and $17 million for operating expenses in its statement of the case.

Respondents subsequently announced that Petitioner would not be funded, but that all other private entities would be, based on the grants approved. Respondents subsequently funded other private grantees. Petitioner submitted to the Court of Appeals, in the form of official GDB documents filed with the local legislature, evidence that became available after the District Court granted the Motion to Dismiss to the effect that other private grantees were being funded and had been given the opportunity to sign Service Agreements (as had been alleged in the Amended Complaint). App. 94a. The Amended Complaint also included evidence and allegations of the lack of observance by Respondents of some of the same requirements imposed on Petitioner. App. 94a.

Petitioner then filed suit. App. 2a, 7a. The District Court ordered limited discovery and set a hearing date for a preliminary injunction. App. 7a. Respondents filed a Motion to Dismiss under Rule 12(b)(6). On the date of the preliminary injunction hearing, with the parties ready to present their evidence, the district court postponed the hearing. No evidence, other than that attached by Petitioner to the Amended Complaint and to Petitioner's Opposition to Motion to Dismiss, was received. The District Court subsequently granted the pending Motion to Dismiss, without receiving evidence on the intent of the contracting parties or whether they believed a contract had been formed – a question of fact – and chose to exalt form over substance. *Id.* The District Court ignored specific allegations in the Amended Complaint that the parties had formed the Contract and, furthermore, that they had reached a meeting of the minds on the Service Agreements. App. 64a.

Respondents never argued that the Contract had not been formed or that the Service Agreements were not the product of their negotiations. Respondents maintained, however, that the Service Agreements were essential and that the negotiated Service Agreement was insufficient merely because the parties had not signed it. The District Court agreed, focusing on the lack of a signature. App. 27a. The District Court, addressing Petitioner's argument that the failure to sign was due to political discrimination, then ruled that under this Court's precedent in *Board of County Commissioners v. Umbehr*, 518 U.S. 668 (1996) and *O'Hare Truck Service Inc. v. City of Northlake*, 518 U.S. 712 (1996), Petitioner did not have a sufficient preexisting relationship with Respondents to be protected by the First Amendment. App. 25a-29a. Ignoring six years of efforts by former administration officials, countless documents formally expressing the Government's decision that the Children's Museum would be owned and operated by Petitioner, a Bond Issue, the CTF's request for proposals and acceptance of Petitioner's proposal and Petitioner's reply, Petitioner's purchase of the Museum's assets for a ten million dollar payment from Petitioner's grant funds, and the contractual obligations between the parties, the District Court concluded Petitioner was a mere applicant or bidder, with no pre-existing relationship and thus not entitled to First Amendment protection. App. 29a, 36a-101a.

The First Circuit affirmed. App. 1a-17a. During oral argument, the First Circuit sought and obtained the consent of the parties to consider the appeal under Rule 56 of the F.R.Civ.P. App. 3a. In affirming the dismissal, the First Circuit ignored the contract, finding that it was not critical. App. 10a. On the Service Agreements, it ruled that the contract had not been formed, not because it had not been signed, but because material issues remained to be negotiated. App. 11a. The First Circuit reached this conclusion despite the nearly 100 cases and numerous Civil Code provisions that support Petitioner's position as to the formation of a Contract and without even a suggestion by Respondents as to what material elements remained to be negotiated. There was no evidence in the record to support the conclusion that the parties had not resolved material matters. Moreover, the Amended Verified Complaint averred that "the parties had agreed to the terms of the [contract] and the only action needed was the non-discretionary ministerial act of signing the agreement." App. 64a.

The First Circuit, in addressing Petitioner's constitutional claims, expressly avoided taking a position on the split among the circuits over the question of whether an applicant or bidder for a government contract is entitled to First Amendment protection. App. 13a. The First Circuit decided Petitioner had no First Amendment protection based on its novel conclusion that Petitioner was a policymaking/confidential independent contractor. App. 14a

The decision was based on an analogy with employment cases. App. 14a. No case was cited for that proposition. The sole criterion used to find this particular independent contractor was a policymaking/confidential contractor was the monetary amount of the contract.

App. 14a. In doing so, the First Circuit ignored this Honorable Court's clearly established precedent. In order to determine whether the policymaking/confidential exception to First Amendment rights applies, Respondents had "to demonstrate that party affiliation [was] an appropriate requirement for the effective performance of the [contract] involved." *Branti v. Finkel*, 445 U.S. 507, 518 (1987) or prevailed under the *Pickering v. Board of Education*, 391 U.S. 563 (1968) balancing test, as required by *Umbehr* and *O'Hare* for independent contractors. Reversal and remand on this ground is proper since "the courts below . . . did not pass on the balance between the government's interest and the free speech at stake." *Umbehr* at 685.

In addition, Respondents never suggested what interests could, conceivably, be so compelling as to deny Petitioner's First Amendment protection. Nor did they discuss the *Pickering* balancing test nor any interest that could have outweighed Petitioner's First Amendment rights. Neither did the First Circuit. The only reason suggested was the expense of the project: "Firing a street sweeper who voted for the loser is one thing; turning over a publicly funded $70 million museum to the opposition party is quite another." App. 14a. "[T]he short and perhaps the best answer to any objection based upon expense [is]: 'We will not put a price tag upon constitutional rights'" *Smith v. Hooey*, 393 U.S. 374, 381, n.11 (1969) (citation omitted).

Petitioner sought a panel rehearing and a rehearing *en banc*. Both were denied on November 22, 2002. App. 35a-36a.

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## WHY CERTIORARI SHOULD BE GRANTED

### I. THE COURT OF APPEALS FOR THE FIRST CIRCUIT FAILED TO APPLY THE PRECEDENT RELEVANT TO THE STANDARD FOR A MOTION TO DISMISS

There was no suggestion by the First Circuit that the Verified Amended Complaint and its supporting documents, failed to comply with the requirement of "a short and plain statement of the claim showing [Petitioner] was entitled to relief." Rule 8(a)(2) of the F.R.Civ.P.; *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 508 (2002). Nor was there a suggestion that the Verified Amended Complaint failed to give Respondents fair notice of Petitioner's claim and the grounds upon which it rested. *Id.*

The question then becomes whether the Court of Appeals "construed [Petitioner's pleadings so] as to do substantial justice" (Rule 8(e) of the F.R.Civ.P., *Swierkiewicz*, at 122 S.Ct. 998) and, most importantly, "whether it [was] clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Swierkiewicz* at 514 *quoting Hishon* v. *King & Spalding*, 467 U.S. 69, 73 (1984). The Court of Appeals' ruling cannot be reconciled with these principles.

The Court of Appeals dismissed, as not critical, one of Petitioner's fundamental allegations. Petitioner alleged that it submitted a proposal to the CTF for funds to acquire complete and operate the Children's Museum and that the CTF's Board approved the proposal. App. 10a The letter granting the funds expressly incorporated the terms of the CTF law, its regulations, other applicable laws and regulations. The letter also required the adoption of supplemental Service Agreements (containing "the details on the procedures for the disbursement of funds") and asked Petitioner to accept these terms. Petitioner accepted through a separate letter. This formed the Contract.

The courts below placed great emphasis on the fact that the letter from the CTF required entering into the Service Agreements and those were not signed. App. 23a-24a. Both courts focused entirely on the Service Agreements, discounting the importance of the Contract. Petitioner argued that the Contract was sufficient without the Service Agreements. Petitioner also discussed the entire Service Agreements and pointed out to the Court of Appeals how every single term of the agreement[4] was already incorporated by reference into the Contract.

Petitioner pointed out six separate factual conclusions a jury could make, based on the allegations of the Verified Amended Complaint, that would make the Contract a binding contract. Each was supported by First Circuit precedent. Under any of these scenarios, whether or not the parties negotiated the Service Agreements or whether they became *additional* obligations, would be wholly irrelevant. These factual scenarios are:

(1) a finding that the Service Agreements were not essential elements to the Contract at the time the letters were sent, supported by the CTF's disbursement of $10 million from Petitioner's grant in order to purchase the Children's Museum assets; cf. App. 53a.

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[4] The only exceptions were noted above in the Statement of the Case. Neither the Court of Appeals nor the District Court found these exceptions to be material.

(2) Respondents' actions belie their contention that the grant was conditioned on the signing of the Service Agreements. Respondents performed a substantial portion of their obligations to Petitioner in making the disbursement and transferring the assets; cf. App. 53a

(3) "the important question . . . would, presumably, have centered on whether [Petitioner's proposal] met [the CTF's] needs and specifications, and not on the background details of how the [funds would be disbursed]" *quoting Interstate Litho Corp. v. Brown*, 255 F.3d 19, 277 (1st Cir. 2001); cf. App. 64a

(4) the Service Agreements were solely for the CTF's benefit and, even if the execution was a condition on fund disbursement, Respondents waived the condition. *Gutor International Ag v. Raymond Packer Co.*, 493 F.2d 938, 944 (1st Cir. 1974); cf. App. 64a

(5) the parties had an enforceable "agreement to agree" *Soar v. National Football League Players' Assoc.*, 550 F.2d 1287, at 1291, n.8 (1st Cir. 1977). The First Circuit has enforced obligations even where there was "disagreement over precisely what clauses in the various draft . . . were the subject of contention." *Ismert and Associates v. New England Mut. Life Ins.*, 801 F.2d 536, 539 (1st Cir. 1986); cf. *Id.*

(6) the Service Agreements were a "'mere memorial of [a] contract already final by the earlier mutual assent of the parties.' [citations omitted]" *Salem Laundry Company v. New England Teamsters and Trucking*

*Industry Pension Fund*, 829 F.2d 278, 281 (1st Cir. 1987). cf. *Id.*

Petitioner could have proven any of these factual scenarios consistent with its allegations with the evidence submitted, and under any one of them would have been entitled to relief. None was contested by Respondents or either lower court. The Court of Appeals' decision in affirming the lower court's dismissal when "relief could be granted under any [of these sets] of facts" is irreconcilable with *Swierkiewicz*.

Even if we were to assume that the Contract was not enforceable and was properly disregarded as a viable theory for relief, the Court of Appeals also failed to follow *Swierkiewicz* by adjudicating a fact – finding that the parties had not reached an agreement as to all material elements of the Service Agreement. Contract formation is a question of fact. *See, e.g.*, *Interstate Litho Corp.*, 255 F.3d at 27-28 (1st Cir. 2001). Whether the Contract is complete is dependent on the intention of the parties – also a question of fact. *Id.* More importantly, the Court of Appeals was not at liberty to disregard a specific allegation in Petitioner's Verified Amended Complaint to the contrary. *Christopher v. Harbury*, 536 U.S. 403, ___, 122 S. Ct. 2179, 2182 (2002).

The Verified Amended Complaint states that "the parties had agreed to the terms of the Service Agreement and the only action needed was the non-discretionary ministerial act of signing the agreement." App. 64a. Respondents did not argue to the contrary, and the record supports this factual statement. All Respondents argued was that the lack of a signature invalidated the agreements. This argument seems to have been dismissed by the Court of Appeals. Under its precedent, the "argument, that when the parties to an agreement contemplate a written document will memorialize a contract, there can be no agreement until the document is executed, is a radical and doomed departure from the principles of contract law." *Quint v. Staley Manufacturing Company*, 246 F.3d 11, 15 (1st Cir. 2001).

The material elements were, in the opinion of the Court of Appeals, the following:

1. "the service contract drafts left blank a number of important terms, such as the amount of the grant." App. 11a. Yet, the grant amounts were alleged in the Amended Complaint and accepted by the Court of Appeals in its rendition of the facts. App. 4a. The other blanks were (1) the signature date; (2) Petitioner's name (although it is uncontested that this would be a contract between Petitioner and the CTF); (3) the date of submission of Petitioner's proposal (a matter of record and not contested); (4) internal references within the document to other of its sections; and, (5) the names of the signatories (not yet determined).
2. the indemnity provision note added by Petitioner related to 32 L.P.R.A. §§ 3085-3092, "a statute providing defense and indemnification benefits to certain categories of public officials. . . . " The CTF law, 24 L.P.R.A. § 3127, already granted more comprehensive coverage because the concession of legal representation and the payment of judgments provisions are mandatory. The CTF law had already been expressly incorporated into the Contract; and, finally,

3. Petitioner's request "to limit the Trust Fund's ability to terminate the grant for cause to an exercise of reasonable discretion." App. 11a. Nonetheless, under Puerto Rico law, the discretion granted to government officials is necessarily restricted to the "honest exercise of reasonable discretion." *Pueblo v. Hernández*, 41 P.R.R. 497 (1930); *Debien v. Junta de Contabilidad*, 76 P.R.R. 91 (1954). This change was thus immaterial.

The Court of Appeals failed to apply the relevant precedent in finding that these issues were material and in adjudicating the issue where there existed a specific allegation to the contrary in the Verified Amended Complaint, duly supported by the record. The Court of Appeals decision is thus irreconcilable with this Court's pronouncements in *Swierkiewicz*, and *Christopher v. Harbury*, 536 U.S. 403.

## II. THE COURT OF APPEALS FOR THE FIRST CIRCUIT MISAPPLIED RELEVANT PRECEDENT BY MISCONSTRUING UNCONTROVERTED FACTS

During oral argument, the Court of Appeals sought, and obtained the consent of the parties to treat the case as one for summary judgment. App. 3a. *See* Rule 12(b) of the F.R.Civ.P. The Court of Appeals, however, did not clearly state under what rule it acted. The difference is important.

> Under a motion to dismiss, "it is the defendant's conduct *as alleged in the complaint* that is scrutinized. . . . On summary judgment, however, the plaintiff can no longer rest on the pleadings, see Fed. Rule Civ. Proc. 56, and the court looks to the evidence before it (in the light most favorable to

> the plaintiff)." *Behrens v. Pelletier*, 516 U.S. 299, 309 (1996) (internal quotations omitted). "To prevail on a Federal Rule of Civil Procedure 56 motion for summary judgment – as opposed to a motion to dismiss – [the moving party] must establish that there exists no genuine issue of material fact as to . . . the merits." *DOC v. U.S. House of Representatives*, 525 U.S. 316, 329 (1999). Unlike the case of a Motion to Dismiss, under Rule 56 Respondents had an evidentiary burden. Rule 56(e) requires that the party opposing summary judgment "must set forth *specific* facts showing that there is a genuine issue for trial" (emphasis added). Respondents failed to do so.

Rather than accept the facts as set forth in the Verified Amended Complaint, the First Circuit based its decision on a crucial misreading of the facts, contrary to the requisites of this Court. *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986). Although Petitioner alleged that partisan politics was not a factor in its selection of Board members or employees, the First Circuit characterized Petitioner as the "opposition party." App. 14a. This misconstruction is vital to the First Circuit's reasoning by analogy that Petitioner is a confidential grantee akin to a confidential employee. Nonetheless, it is uncontested that selections for Petitioner's Board were made without regard to partisan politics and that, as a result, Board members of both major parties or without any party affiliation were selected. App. 66a. Moreover, as argued in more depth below, the analysis employed by the Sixth Circuit in the *Lac Vieux* case is more consonant with the precedent of this Court. *See Celotex* at 326.

Likewise, the Circuit Court's affirmance of the dismissal of Petitioner's equal protection claim is based on an incorrect reading of the record. The First Circuit holds that "Prisma Zona does not point to any similarly situated grantee," App. 16a, but Petitioner alleged that Respondents announced that they would fund every other private grantee. App. 76a. Those grantees were similarly situated in that they had not signed Service Agreements at the time of the announcement. *Id.* In addition, Petitioner provided the First Circuit with evidence that other grantees, which were not associated with the NPP, were permitted to sign Service Agreements. By reading the Verified Amended Complaint to the contrary, the First Circuit failed to apply this Court's precedent. *Celotex* at 326. Likewise, the First Circuit overlooked the uncontested fact that the parties had a contract and agreed to all material elements of the service agreements.

## III. THE CIRCUITS ARE SPLIT ON THE ISSUE OF THE FIRST AMENDMENT RIGHTS OF INDEPENDENT CONTRACTORS

In *Board of County Commissioners v. Umbehr*, 518 U.S. 668 (1996), this Court specifically left open the resolution of the issue of whether independent contractors which did not have an ongoing commercial relationship with the government could be discriminated against based on their exercise of First Amendment rights of freedom to affiliate politically. Since that time, the Third Circuit has found that such discrimination is constitutionally sound. *McClintock v. Eichelberger*, 169 F.3d 812 (3rd Cir. 1999), *cert. denied*, 528 U.S. 876 (1999). The Sixth Circuit has held, to the contrary, that a contractor with no ongoing commercial relationship with the government may not be discriminated against based on the exercise of its First Amendment rights. *Lac Vieux Desert Band v. Michigan Gaming Control Board*, 172 F.3d 397 (6th Cir. 1999) and 276 F.3d 876 (6th Cir. 2002), *Lac Vieux II*; *Lucas v. Monroe County*, 203 F.3d 964, 972 (6th Cir. 2000).

The Eleventh Circuit has also resolved that the First Amendment is implicated in a case involving the failure to renew a contract in the absence of an automatic renewal clause such as the one that existed in *Umbehr. Mangiere v. DCH Health Care Authority*, 304 F.3d 1072 (11th Cir. 2002). The *Mangiere* case is on all fours with that of Petitioner. In *Mangiere* as with Petitioner, the government had had an ongoing relationship with the actors involved in providing the service for its citizens. Like the District Court in *Mangiere*, in the instant case, the District Court and the First Circuit based their analysis on the lack of a property interest due to the lack of a contract. But the inquiry does not end there. In *Mangiere,* the Eleventh Circuit held that the government cannot place unconstitutional conditions on the grant of a contract due to the lack of a proprietary interest.

Similarly, the Fifth Circuit has found that the "unconstitutional conditions" doctrine comes into play in circumstances where the plaintiff does not have a right to the benefit in question. *Kinney v. Weaver* at 270, *citing Umbehr.* For instance, Respondents legitimately could have stopped Petitioner's funding based on an auditor's finding. But Respondents' decision to cease funding the children's museum because its Executive Director preferred the status of statehood for Puerto Rico was not a legitimate governmental interest. *Id.*

The Tenth Circuit has held that the benefit of a commission as a reserve deputy cannot be rescinded as punishment for the exercise of the First Amendment right to support a particular candidate. *Bass v. Richards,* 308 F.3d 1081 (10th Cir. 2002). The Tenth Circuit had previously held that an intern may not be denied the experience of being an intern based on the exercise of free speech rights. *Andersen v. McCotter*, 100 F.3d 723, 727 (10th Cir. 1996).

The First Circuit itself has held that the denial of a benefit may not be predicated upon the exercise of First Amendment Rights. *El Dia, Inc. v. Rossello*, 165 F.3d 106, 109 (1st Cir. 1999) (cancellation of newspaper advertisements); *Nestor Colon Medina & Sucesores, Inc. v. Custodio*, 964 F.2d 32, 40-41 (1st Cir. 1992) (the denial of a land use permit); *see also North Mississippi Communications v. Jones,* 792 F.2d 1330, 1337 (5th Cir. 1986) ("although the [newspaper] may have no 'right' to receive certain legal advertising from the County Board . . . it would violate the Constitution for the Board to withhold public patronage, in the form of its advertising, . . . in retaliation for that newspaper's exercise of first amendment rights.") Thus, one must conclude that Petitioner is entitled to First Amendment protection and the only question is the amount of protection afforded.

The Second Circuit has decided to wait for the explicit guidance of this Court. *African Trade & Information Center, Inc. v. Abromaitos*, 294 F.3d 355 (2nd Cir. 2002) Nonetheless, the concurrence in *African Trade* noted that, but for the express language in *Umbehr* that the issue of contractors without a preexisting contractual relationship with the government would be left for resolution on another occasion, he would have found that this Court's decisions clearly foreshadowed a determination that independent contractors without a prior relationship with the government could not be discriminated against based on their political affiliation. In *Hous. Works, Inc. v. Turner*, 179 F.Supp.2d 177, 2001 (S.D.N.Y. 2001), *aff'd in an unpublished opinion by the Second Circuit*, the Southern District of New York found that the existence of a contract was not a condition precedent to First Amendment protection. Rather, the operative consideration was a pre-existing commercial relationship. *Id.*

The focus must be on the First Amendment rights. "The government may deny funding for any number of reasons, but this Court has found that certain reasons are not sanctioned by the Constitution." *Rutan v. Republican Party of Illinois*, 497 U.S. 62, at 66-68 (1990). In *Rutan*, this Court ruled that hiring decisions are not "different in kind" from the terminations involved in *Branti v. Finkel*, 445 U.S. 507 (1987) and *Elrod v. Burns*, 427 U.S. 347 (1976). As the dissent found in *McClintock*, "it is logical to conclude that all independent contractors fall within the standard set forth in *Umbehr*, in *O'Hare*, and in the government employee cases." *McClintock*, 169 F.3d at 820. If there is no principled distinction between hiring and firing of employees, there can be no principled distinction between the termination of contractual relationship and the commencement of a contractual relationship with the government.

The analysis of the Fifth Circuit in *Blackburn v. City of Marshall*, 42 F.3d 925, 929 (5th Cir. 1995), warrants consideration in this context. "At the outset, we reject the district court's apparent assumption that only public employees enjoy the protections of the First Amendment. The district court's reasoning is inverted. Every citizen enjoys the First Amendment's protections against governmental interference with free speech, but the First Amendment rights of public employees are restricted by the nature of the employer-employee relationship." *Id. See also Kinney v. Weaver,* 301 F.3d at 280. ("Indeed, the Court's decisions in *Pickering*, *Umbehr*, and *O'Hare Truck Service* are based on the assumption that although the government may have relationships with individuals in addition to a government/citizen relationship, individuals do not, as a result of such relationships, cease to be citizens with First Amendment rights that the government is obligated to respect.") In *Kinney v. Weaver*, 301 F.3d 253 (5th Cir. 2002), the Fifth Circuit found that police departments violated the First Amendment rights of police officer instructors who provided expert testimony against other police departments by boycotting the academy that contracted the services of the police officers.

Here, Respondent Agosto-Alicea told the President of Petitioner that its Executive Director would have to go because she was associated with the opposition party, and added that the Governor felt that she had a right to name people associated with the PDP to Petitioner's Board. Petitioner was willing to consider the demands made by the party in power because it feared the consequences of dissent: the elimination of all funding. It is that "chilling effect" on political speech which is so rightly feared by the Sixth Circuit in *Lac Vieux II.* 276 F3d at 880. The specter of self-censorship raised by the Sixth Circuit materialized in the instant case even prior to the announcement that the Children's Trust Fund would provide funds to all the remaining not for profit corporations, but not to Petitioner. Petitioner's President felt compelled to consider whether it was worthwhile to forego the demonstrated talents of its

Executive Director simply because her political ideology was unpalatable to the party in power.

The availability of First Amendment protection only starts the analysis. The next concern is to balance the government's right to efficient operations against employee's right to speak on matters of public concern. *Pickering v. Board of Ed.*, 391 U.S. 563, 568 (1968). "[G]overnment employers cannot place such conditions on employment unless the government's interests "in promoting the efficiency of the public services it performs through its employee" outweigh those of the employee "in commenting on matters of public concern." ***Mansoor v. Trank,*** ___ F.3d ___, U.S. App. LEXIS 1846 (4th Cir. Feb. 4, 2003) *quoting United States v. Nat'l Treasury Employees Union* (NTEU), 513 U.S. 454, 465 (1995); *Pickering* at 568.

To the extent the First Circuit took Petitioner's First Amendment rights into consideration, the First Circuit limited its inquiry to the monetary value of the benefit Petitioner would have derived in the absence of the discrimination and determined that since the grant's monetary value was exponentially higher than that of street sweeper's salary, discrimination based on political affiliation was acceptable. App. 14a. The efficient operation of government or any other compelling government interest was not even articulated by the First Circuit.

We respectfully submit that the monetary amount of the grant was the wrong criterion to examine. *Smith*, 393 U.S. at 381, n.11. This Court did not consider the monetary value of the contracts in *Umbehr* or *O'Hare*. The fact that millions of dollars were at stake did not enter into the analysis performed by the Circuit Court in *Lac Vieux II*, 276 F3d at 880 ("Barring governments from endorsing or punishing political activity . . . is among the paramount functions of the First Amendment's Free Speech Clause.") In fact, the dissent in *Lac Vieux II* demands to know whether the Sixth Circuit is requiring the razing of multi-million dollar casinos. *Id.* at 883. The majority opinion in *Lac Vieux II* does not address the dissent's query, because it made a principled decision, starting from the foundation that the core values of the First Amendment apply to political speech and political association, and then progressing to the consequences.

In *Umbehr*, this Court rejected the government's argument that the relatively lesser dependence of independent contractors on the government for their livelihood led to the conclusion that their contracts could be terminated without considering their First Amendment rights. In fact, in the instant case, Petitioner stands virtually in the shoes of a government employee whose application is refused for politically partisan reasons because Petitioner depends on the government for virtually all of its funding.

This Court should intervene because the First Circuit has manifested an interpretation of the role that partisan politics should play vis-a-vis policy decisions that is irreconcilable with this Court's precedent. The First Circuit presents the following hypothetical: "Imagine that the President of the United States were considering whether a new federally supported billion-dollar pipeline were to run through one state or another. Numerous policy and technical arguments exist on both sides; it also happens that one state supported the President in the last election and the other did not. Only an extreme enthusiast could suppose that the First Amendment would license an inquisition into the question whether politics played some part in the deliberations."

First Amendment as applied to the states through the Fourteenth Amendment mandates that interpreters of the Amendment be "extreme enthusiasts." The Amendment is unequivocal. "Congress shall make no law . . . abridging the freedom of speech." Petitioner strongly disagrees with the First Circuit's conclusion that partisan politics should be the determining factor in the location of public works projects, or in the operation of a children's museum. The First Circuit would permit its hypothetical pipeline to detour around a particular state based on that state's party affiliation. The inevitable result would be the curbing of dissent, the chilling of public debate on matters of public concern in violation of the First Amendment. *Cf. Rutan* at 73.

This Court has recognized that the First Amendment can conflict with other legitimate government goals. With *Branti* and its progeny, this Court has developed the rubric for the balancing test required by *Pickering*. *Branti* itself articulates the standard: "unless the government can demonstrate 'an overriding interest of vital importance requiring that a person's private belief conform to those of the ruling authority, his beliefs cannot be the sole basis of depriving him of continued public employment." *Id.* at 515-16. Thus, according to this Court's decisions, in the pipeline hypothetical, initially it would be up to the plaintiff to allege that the government based its decision on partisan politics rather than legitimate criteria. Then, and only then, would the government have to demonstrate that the decision for a pipeline to pass through one state rather than another ought to be based on the partisan politics of the occupants of the state due to the overriding interest of vital importance that would somehow link a pipeline's construction to ideological beliefs.

This Court has held: "To the victor belong only those spoils that may be constitutionally obtained." *Rutan* at 64. "The First Amendment prevents the government, except in the most compelling circumstances, from wielding its power to interfere with its employees' freedom to believe and associate, or to not believe and not associate." *Id.* at 76. By analogy to *Umbehr*, that same proscription applies to independent contractors. "It is unnecessary here to consider whether not being hired is less burdensome than being discharged, because the government is not pressed to do either on the basis of political affiliation. The question in the patronage context is not which penalty is more acute, but whether the government, without sufficient justification, is pressuring employees to discontinue the free exercise of their First Amendment rights." *Rutan* at 79.

In the instant case, Petitioner has alleged that the decision not to fund the children's museum was based on partisan politics. According to *Rutan*, the next inquiry is whether the government has sufficient justification to pressure Petitioner into dismissing its Executive Director and accepting Board members chosen because of their affiliation with the Popular Democratic Party or even denying Petitioner all funding because it has been inexorably tainted by its association with the pro statehood party. As this Court found in the *Rutan* context, government jobs are a valuable commodity. So, this Court found in *Umbehr* and *O'Hare,* are government contracts.

Is the operation of a children's museum dependent on one's ideological preference toward statehood? Respondents never attempted to claim so and the First Circuit does not so find. *Cf. Brooklyn Institute of the Arts and Sciences v. City of New York,* 64 F.Supp.2d 184 (E.D.N.Y.

1999); *Cuban Museum of Arts and Culture, Inc. v. City of Miami,* 766 F.Supp. 1121 (S.D.Fla. 1991). The line of cases beginning with *Pickering*, continuing with *Elrod,* through to *Umbehr* point to a contrary conclusion. Respondents were barred by the First Amendment from denying funding to Petitioner based on the partisan politics of its Executive Director and some of its Board members.

◆

## CONCLUSION

THEREFORE, Petitioner Prisma Zona Exploratoria de Puerto Rico, Inc., requests this Court that it GRANT its Petition for a Writ of Certiorari to the United States Courts of Appeals for the First Circuit.

Respectfully Submitted,

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# APPENDIX A

## PRISMA ZONA EXPLORATORIA DE PUERTO RICO, INC., Plaintiff, Appellant, v. HON. SILA MARIA CALDERON, personally and in her official capacity as Governor of Puerto Rico and as President of the Children's Trust Fund; JUAN AGOSTO-ALICEA, personally and in his official capacity as President of the government Development Bank of Puerto Rico and as Vice-President of the Children's Trust Fund; JORG PESQUERA, personally; MILTON SEGARRA-PANCORBO, personally and in his official capacity as Executive Director of the Puerto Rico Tourism Company; JOSE V. PAGAN, personally and in his official capacity as Executive Director of the Children's Trust Fund; THE CHILDREN'S TRUST FUND; GOVERNMENT DEVELOPMENT BANK FOR PUERTO RICO; JOHN DOE; GEORGE DOE 01CV1836; JANE DOE, Defendants, Appellees.

**No. 01-2612**

**UNITED STATES COURT OF APPEALS,**
**FOR THE FIRST CIRCUIT**

**310 F3d 1; 2002 U.S. App. LEXIS 21539**

**October 16, 2002, Decided**

**PRIOR HISTORY:**

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO. Hon. Juan M. Perez-Gimenez, U.S. District Judge.

***Prisma Zona Exploratoria de P.R., Inc. v. Calderon***, 162 F. Supp. 2d 1, 2001 U.S. Dist. LEXIS 15502 (D.P.R. 2001)

**DISPOSITION:**

Affirmed

**COUNSEL:**

Luis G. Rullan-Marin with whom Zoraida Buxo-Santiago, Rullan & Buxo, PSC, Jane Becker-Whitaker and Law Offices of Jane Becker Whitaker, PSC were on brief for appellant.

Rafael Escalera-Rodriguez with whom Nester J. Navas and Reichard & Escalera were on brief for institutional defendants.

Camella Fernandez-Romeu, Assistant Solicitor General, with whom Roberto J. Sanchez-Ramos, Solicitor General, and Vanessa Lugo Flores, Deputy Solicitor General, were on brief for individual defendants.

**JUDGES:**

Before Boudin, Chief Judge, Bownes, Senior Circuit Judge, and Selya, Circuit Judge.

**OPINION BY:**

BOUDIN

**BOUDIN, Chief Judge.** Plaintiff **Prisma Zona Exploratoria** de Puerto Rico ("Prisma Zona") sued the Children's Trust Fund of Puerto Rico (the "Trust Fund") and others (including several high officials in the Puerto Rican government) under 42 U.S.C. § 1983 (2000). Prisma Zona claims that the defendants discriminated against it because of its affiliation with a rival political party, in violation of its rights under the First Amendment and to due process and equal protection. The district court dismissed the suit under Rule 12(b)(6) for failure to state a claim. ***Prisma Zona Exploratoria*** *de P.R., Inc. v. Calderon,* 162 F. Supp. 2d 1, 9-10 (D.P.R. 2001). This appeal followed.

The background facts are largely uncontested. For present purposes, we assume the truth of the allegations in the complaint and draw inferences in favor of the nonmoving party, here Prisma Zona. *Aulson v. Blanchard,* 83 F.3d 1, 3 (1st Cir. 1996). However, we also draw where necessary upon undisputed documents that are in substance cross-referenced in the complaint. *Watterson v. Page,* 987 F.2d 1, 3-4 (1st Cir. 1993); *accord Beddall v. State St. Bank & Trust Co.,* 137 F.3d 12, 16-17 (1st Cir. 1998). At oral argument, both sides said that the case could be treated as one for summary judgment.

In January 1999, then Governor Pedro Rossello of Puerto Rico, a member of the New Progressive Party ("NPP"), announced a plan to create a children's museum in Puerto Rico. The museum, modeled on similar initiatives in Boston and elsewhere, was to include interactive exhibits, a theater and other attractions. It was to be built and operated using a portion of Puerto Rico's share of the master tobacco settlement of November 1998.

In April 1999, the Tourism Company, a state agency, created a public corporation, Prisma El Exploratorio, Inc. ("Exploratorio"), to develop the preliminary phase of the children's museum. Prisma Zona says the plan was eventually to turn over ownership and control of the museum to a private non-profit entity to free it from "political partisanship." The following month Exploratorio secured a $20 million line of credit with the Government Development Bank (the "Bank") – another state entity – to help pay for the design and construction of the museum facilities; the line of credit was to be repaid using the tobacco settlement proceeds. Ground breaking for the museum was held on October 7, 1999.

On July 30, 1999, Puerto Rico created the Children's Trust Fund, a public corporation, and assigned to it Puerto Rico's share of the tobacco settlement. Act No. 173 of July 30, 1999 (codified at 24 LPRA § 3121 *et seq.* (2002)). The statute created a board of directors for the Trust Fund, consisting of four *ex officio* members (the Governor, the Secretary of Justice, the President of the Bank, and the Director of the Office of Management and Budget) and three private persons appointed by the Governor, and gave it broad authority to allocate trust funds to improve the welfare of Puerto Rico's children. *Id.* §§ 4-5. The Bank provides all of the Trust Fund's staffing, conducts its day-to-day management, and serves as its disbursement agent and financial advisor. *Id.* §§ 12, 14.

On September 29, 1999, the Trust Fund board adopted regulations, pursuant to its statutory authority, establishing requirements for the receipt and use of trust funds. In addition, the board approved Exploratorio's request for up to $60 million to cover museum expenses. Prisma Zona says the board also resolved to transfer the grant to the private entity that would eventually succeed to the project.

Earlier in that same month, several private citizens formed **Prisma Zona Exploratoria** de Puerto Rico, Inc. ("Prisma Zona"), the plaintiff in this action, to take over the construction, ownership, and operation of the children's museum. The company's founders and management had close ties to the NPP and its board of directors was selected by Governor Rossello. The present case revolves around this new entity's effort to secure control over the children's museum and its funds and the rebuff of those efforts by a new administration under a different party.

In May 2000, Prisma Zona began negotiations with the Tourism Company and its subsidiary Exploratorio to acquire the museum assets and to assume the responsibility for its development. On June 16, 2000, it requested $60 million from the Trust Fund to pay for the museum assets and to complete its construction and an additional $17.5 million to operate it for three years. The Trust Fund board approved Prisma Zona's requests on August 30, 2000. That day, Governor Rossello (as president of the Trust Fund board) sent Prisma Zona a letter informing it of the board's approval but noting additional required steps, including review of Prisma Zona's budget and finalization of a contract containing "details on the procedures for the disbursement of funds."

On November 15, 2000, the Trust Fund issued $400 million in bonds to fund its projects and transferred nearly $10 million to the Bank to cancel Exploratorio's outstanding line of credit. Both the Trust Fund and the Bank (which managed the bond sale) represented in various documents (including a prospectus, tax certificate, and bond contract) that a portion of the bond sale proceeds would be used for the "acquisition, construction, and equipping of a children's museum . . . in Isla Grande, Santurce, Puerto Rico, to be owned and operated by [Prisma Zona]."

On November 29, 2000, Prisma Zona reached an understanding with the Tourism Company and Exploratorio to acquire the museum project (the "Transfer Agreement"). The following month Prisma Zona began negotiating a service contract with the Trust Fund. The Trust Fund prepared two form contracts (one each for the capital and operational grants) and sent them to Prisma Zona for its review on December 28, 2000. Prisma Zona says it made only "minor" changes to these documents before faxing them back to the Trust Fund the same day. The Trust Fund never responded. Nonetheless, Prisma Zona alleges that at this time "the parties had agreed to the terms of the [service contracts] and the only action needed was the non-discretionary ministerial act of signing the agreement."

As these events were unfolding, Puerto Rico was holding its 2000 elections. During the campaign for Governor, Sila Calderon, the Popular Democratic Party ("PDP") candidate, promised to investigate a number of Rossello administration projects, including the children's museum, for corruption and misuse of public monies. Calderon defeated the NPP candidate at the polls on November 7, 2000, and took office on January 2, 2001. In its subsequent complaint Prisma Zona alleged that from the outset the new PDP administration attempted to undermine Prisma Zona's role in the museum project because of its ties to NPP and former Governor Rossello. In particular, Prisma Zona said the Bank (as the Trust Fund's disbursement agent) has refused to pay museum invoices that Prisma Zona has submitted since January 2001 and that the Bank subjected it to a sham audit. Prisma Zona also alleged that in May 2001, the Tourism Company filed a "frivolous" suit in commonwealth court, seeking to invalidate the Transfer Agreement. (Thereafter the Puerto Rico Superior Court declared the Transfer Agreement void under Puerto Rico law. *Compania de*

*Turismo de Puerto Rico v.* ***Prisma Zona Exploratoria*** *de PR Inc.,* KAC2001-3380 (506) (April 4, 2002).)

Prisma Zona filed this civil rights action in district court on June 22, 2001, naming as defendants the Trust Fund, the Bank and various individuals in the Calderon administration.[1] Prisma Zona says defendants' refusal to carry through with the transfer of assets and funding was motivated by Prisma Zona's political ties and violated its First Amendment, due process, and equal protection rights. For relief, Prisma Zona seeks imposition of a constructive trust, disbursement of the trust funds, a generally phrased injunction against the alleged harassment, and punitive damages. After limited discovery, the district court dismissed the suit under Rule 12(b)(6). *Prisma Zona,* 162 F. Supp. 2d at 9-10.

The district court ruled that Prisma Zona did not have a binding contract with the Trust Fund obligating it to fund Prisma Zona. *Prisma Zona,* 162 F. Supp. 2d at 4. The court further held that absent such a contract or its effective equivalent (e.g., an ongoing commercial relationship), the Trust Fund was free not to contract with Prisma Zona even if political motives prompted that decision. *Id.* at 7-8. Finally, the court said that even if First Amendment precedents were extended to cover new entities seeking to contract, the defendants had a so-called *Mount Healthy* defense because they would for independent reasons have refused to disburse the funds. *Id.* at 8; *see Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274, 287, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977).

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[1] The individual defendants include Sila Calderon, the Governor of Puerto Rico and president of the Trust Fund's board; Juan Agosto Alicea, president of the Bank and vice-president of the Trust Fund's board; Jose V. Pagan, vice-president of the Bank and executive director of the Trust Fund; Jorge Pesquera, the executive director of the Tourism Company until June 30, 2001; and Milton Segarra Pancorbo, the current executive director of the Tourism Company.

The legal landscape for Prisma Zona's First Amendment claim is a set of Supreme Court decisions starting in the 1970s. Politically motivated hiring, firing and contracting by governments has a long history in the United States; civil service reform statutes are largely a response to this tradition. But beginning with *Elrod v. Burns,* 427 U.S. 347, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976), the Supreme Court has added a new layer of protection based on First Amendment grounds. *See also Rutan v. Republican Party of Ill.,* 497 U.S. 62, 111 L. Ed. 2d 52, 110 S. Ct. 2729 (1990); *Branti v. Finkel,* 445 U.S. 507, 63 L. Ed. 2d 574, 100 S. Ct. 1287 (1980). How far that protection extends, often a debatable matter, is an issue of law which we review *de novo.*

Prisma Zona claims that a completed contract exists between it and the Trust Fund. Although a binding contract is not necessarily a condition of First Amendment protection, it would give Prisma Zona a much firmer basis in Supreme Court precedent to argue that it was protected from a politically motivated refusal to deal, *see*, e.g., *Bd. of County Comm'rs v. Umbehr,* 518 U.S. 668, 685, 135 L. Ed. 2d, 843, 116 S. Ct. 2342 (1996), quite apart from its use as an independent basis for relief under local law. We accordingly begin with that question here.

In a nutshell, Prisma Zona applied to the Trust Fund for funding to buy the museum assets, complete construction and operate the project for three years. The Trust

Fund's president – then Governor Rossello – responded on August 30, 2000, that the board had "favorably considered your proposed initiative," but his letter continued:

> The granting of Assistance Service [*i.e.*, funding] is subject to a review of the budget and the details of the initiative. Prior to receiving the funds requested, you must meet with the Officers of the Trust to . . . [verify information and budget] and to finalize the Contract of Assistance Service. The contract must contain details on the procedures for the disbursement of funds.

The letter set forth other conditions that would govern the grant and said that if Prisma Zona indicated its agreement, the Trust Fund would arrange for a further meeting.

Prisma Zona indicated its agreement and in December the parties moved toward adoption of two detailed "service" contracts, one to fund capital commitments and the other for operating expenses. (From the government's standpoint, a private provider such as Prisma Zona agrees to provide services in exchange for the grant.) However, the Trust Fund's drafts were delivered only on December 28, 2000, they were returned with suggested changes by Prisma Zona, and no final service contracts were signed. Instead, on January 2, 2001, a new administration took power in Puerto Rico and the Trust Fund declined to proceed.

On this appeal, Prisma Zona says that the original August 30 letter and its acceptance constituted a binding contract promising funding, that this contract was not "conditioned" on the adoption of service contracts, and in any event the latter were virtually complete by the end of December save for a few details that were not "material."

Prisma Zona argues that under Puerto Rico law, contract formation is a question of fact, turning on the intent of the parties, and at the very least the fact question could not be resolved on a motion to dismiss but entitled Prisma Zona to a jury trial.

Whether or not one calls the August 30 letter and reply a "contract," the critical question (given the relief sought) is whether the Trust Fund ever assumed a binding obligation to make grants to Prisma Zona. As to this, the August 30 letter is explicit on its face: that – other conditions aside – no funds could be provided until the parties had "finalized" the service contracts. Further, as the district court pointed out, the Trust Fund's own formal regulations provide that "[a] service contract will be entered into between the Trust Fund and the beneficiary entity" and set forth issues that had to be addressed (e.g., "specific clauses delineating the responsibilities of the parties"). *Prisma Zona,* 162 F. Supp. 2d at 4; accord Regulations for the Requisites of Eligibility and the Criteria for Statutory Monitoring under the Statute for the Children's Fund, art. 5(c) ("Trust Fund Regulations").

Alternatively, Prisma Zona suggests that the letter and reply were "a contract to make a contract." This assumes, as we will do at this stage, that Prisma Zona could develop factual evidence of such an intent on both sides. But even if (assuming further) this theory is allowable despite the Trust Fund Regulations just quoted – and this is far from clear – a contract to make a contract is enforceable only where all material terms have been agreed upon. 1 Corbin, *Contracts,* § 2.8, at 131, 133-34 (Perillo ed.1993). Prisma Zona's own statements, and the service contract drafts which it attaches, show that material issues were still open.

Most obviously, the service contract drafts left blank a number of important terms, such as the amount of the grant. In addition, in returning the service contract drafts with proposed changes, Prisma Zona asked for a number of substantive changes. It wanted to limit the Trust Fund's ability to terminate the grant for cause to an exercise of reasonable discretion. The Trust Fund drafts required Prisma Zona to indemnify the Trust Fund for legal expenses arising out of the grant – hardly a trivial matter, as this case illustrates. In response, Prisma Zona's mark-ups required the Trust Fund to use the government's legal representation before incurring separate expenses that Prisma Zona would have to cover. Parties still short of agreement as to such substantive terms have not completed their bargaining.

Nor is Prisma Zona's position helped by the surrounding circumstances that it says bear out the claim of an existing contract. For example, the bond prospectus apparently said that funds would go to Prisma Zona to operate the museum; but – whatever the securities law implications – this is a statement as to what was intended, not a statement that the necessary contracts had already been negotiated. Similarly, Prisma Zona says that the Trust Fund in fact paid out almost $10 million for Prisma Zona's acquisition of the museum, but this appears to have been an intra-governmental payment from the Trust Fund to the Tourism Company to reimburse it for funding the museum's initial investment.

All such events show is what is already conceded, namely, that the Rossello administration intended that the various agencies involved cooperate to transfer the museum and additional funding to Prisma Zona. Indeed, the process was not only intended, but steps just short of a final legal commitment continued even after the November 2000 election. Nevertheless, the service contracts were not completed, let alone signed, before the new administration took office in January 2001. Thus, there was no binding legal obligation to fund Prisma Zona.[2]

Prisma Zona has another string to its bow. It says that it need not have a *right* to a benefit (in this case, the contractual right to funding) to be protected under the First Amendment against a politically motivated denial of that benefit. As an abstraction, this is so: several early cases involved political firings of low-level employees who lacked civil service or contract protection. *Branti,* 445 U.S. at 515; *Elrod,* 427 U.S. at 350-51 (plurality opinion). Today's protection also extends beyond discharging current employees to employee hiring and promotion decisions. *Rutan,* 497 U.S. at 79.

Although current or would-be employees have been specially favored, the Court has also afforded some protection to businesses that deal with the government, *O'Hare Truck Serv., Inc. v. City of Northlake,* 518 U.S. 712, 714-15, 135 L. Ed. 2d 874, 116 S. Ct. 2353 (1996) (removal from list of private towing services); *Umbehr,* 518 U.S. at 686

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[2] Prisma Zona also asks us to imply equitably a quasi-contract or constructive trust between it and the Trust Fund. We decline, not only because the theory is only adverted to perfunctorily on appeal, *United States v. Zannino,* 895 F.2d 1, 17 (1st Cir.), cert. denied 494 U.S. 1082, 108 L. Ed. 2d 944, 110 S. Ct. 1814 (1990), but also because its argument fails entirely to demonstrate the unjust enrichment that would invoke this court's equitable powers, *see Corporacion Insular de Seguros v. Reyes Munoz,* 849 F. Supp. 126, 135 (D.P.R. 1994) (discussing the requirements of constructive trust under both Puerto Rican and general contract law).

(non-renewal of trash hauling contract), although here the coverage is less certain once one goes beyond existing commercial relationships, *see id.* at 685. The next area of contest appears to revolve around those who wish for the first time to bid for government contracts. On this issue, the Supreme Court has not yet spoken definitively, and the circuits appear to be divided.[3]

Happily, such large questions as to whether the *Elrod* line will continue to expand need not be decided to dispose of this case. We will assume, purely *arguendo,* that a state government could not invite bids to supply pencils to the state with the caveat that no company headed by a Democrat could apply. Further, at this stage of fact development, Prisma Zona is entitled to the assumption – which may or may not be correct – that party politics played a role in the Calderon administration's refusal to make the previously intended grant.

Nevertheless, whatever may be true of pencil contracts, we decline to hold that the First Amendment requires politically immaculate state decision-making in cases like this. Even in core cases involving politically motivated hirings and firings, the Supreme Court has itself recognized that a wholly antiseptic application of the *Elrod* principle is unrealistic. Instead, party affiliation *is* an appropriate consideration in hiring and firing decisions with respect to government positions that may be characterized as "policymaking" or "confidential." *Branti,* 445 U.S. at 517-18; *see also Duriex-Gauthier v. Lopez-Nieves,* 274 F.3d 4, 9-10 (1st Cir. 2001); *cf. Walker v. City of Lakewood,* 272 F.3d 1114, 1132 (9th Cir. 2001), cert. denied, 152 L. Ed. 2d 621, 122 S. Ct. 1607 (2002).

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[3] *See,* e.g. *Lucas v. Monroe County,* 203 F.3d 964, 972 (6th Cir. 2000) (tow truck operator who had never been called was protected from removal from the call list), *McClintock v. Eichelberger,* 169 F.3d 812, 817 (3d Cir.) (limiting *Umbehr* and *O'Hare* to ongoing commercial relationships), cert. denied, 528 U.S. 876, 145 L. Ed. 2d 154, 120 S. Ct. 182 (1999); *Tarpley v. Jeffers,* 96 F.3d 921, 924 (7th Cir. 1996) ("The First Amendment bars patronage hiring of independent contractors.").

Here, Prisma seeks to attack a set of decisions related to the possible privatization (whether to do so and through whom) of the operation of a children's museum and directing to it millions of dollars of public monies. Where policy choices of this magnitude are presented, courts ought not be second-guessing how much party politics in the narrower sense may also have played a role. *Cf. Bogan v. Scott-Harris,* 523 U.S. 44, 54-55, 140 L. Ed. 2d 79, 118 S. Ct. 966 (1998). If political considerations are permissible in the hiring and firing of upper-level government employees, surely they are also appropriate in a case like this one.

Imagine that the President of the United States were considering whether a new federally supported billion-dollar pipeline were to run through one state or another. Numerous policy and technical arguments exist on both sides; it also happens that one state supported the President in the last election and the other did not. Only an extreme enthusiast could suppose that the First Amendment would license an inquisition into the question whether politics played some part in the deliberations. Firing a street sweeper who voted for the loser is one thing; turning over a publicly funded $70 million museum to the opposition party is quite another.

Prisma Zona asserts that even without a contract its interest goes beyond that of a mere job applicant or contract bidder. It says that it has started a relationship with the Trust Fund and has committed substantial resources to the endeavor, reasonably anticipating that it would receive the grant. But the concern that underlies the exception as to policymaking functions – and which we apply here by analogy – is not limited to new applicants. Policymakers *can* be replaced, despite reliance, absent legal tenure or contract.

If the complaint's facts are assumed as true, it is at least likely that Prisma Zona's own selection as the prospective grantee under the NPP administration – and perhaps the decision to privatize the museum in the first place – was not uninfluenced by party politics. Prisma Zona seems to think that this is fine for selection but not for de-selection. Others might think that turn-about is fair play. Our own concern is exhausted by finding that Prisma Zona has not set forth a First Amendment violation even if the facts are as alleged.

Prisma Zona makes three other constitutional claims, none of which requires much discussion. First, it says that its efforts to secure and its expectation of receiving the grant funds constituted a property interest, which would at least qualify for protection under Puerto Rico statutes related to quasi-contract and constructive trust, and that this interest in turn is protected against impairment by the Due Process Clause. Prisma Zona makes no serious effort to establish that either state-law doctrine applies on the facts of this case. *Mass. Sch. of Law v. Am. Bar Ass'n*, 142 F.3d 26, 43 (1st Cir. 1998) (undeveloped arguments are deemed abandoned).

Next, in two paragraphs, Prisma Zona says that its right to procedural due process was violated because it was denied "some kind of hearing." *See*, e.g., *United States v. Fla. East Coast Ry. Co.,* 410 U.S. 224, 239 & n.7, 35 L. Ed. 2d 223, 93 S. Ct. 810 (1973). Prisma Zona appears (the argument is quite unclear) to be claiming that it was entitled to make some kind of presentation to the Trust Fund before the grant was set aside. But its brief is silent about its efforts to secure a hearing, what it wanted to demonstrate at such a hearing, and what purpose a hearing would have served. Again, the argument is not seriously developed and we mention it only to say that it has not been overlooked.

Finally, Prisma Zona relies upon equal protection principles. It says that other grants made by the Trust Fund were carried out and that the refusal to complete the grants to Prisma Zona was an irrational discrimination motivated solely by political affiliation. To the extent that this claim pretends to be anything more than a restatement of the failed First Amendment claim, it too is undeveloped and abandoned. Prisma Zona does not point to any similarly situated grantee, let alone a context so similar to this one as to suggest that it was irrational to treat that grantee and Prisma Zona differently.

Our conclusion that Prisma Zona has failed to state a claim under section 1983 makes it unnecessary for us to address the remaining issues noted by the parties: these include the district court's finding of a *Mount Healthy* defense (which Prisma Zona attacks), *Prisma Zona,* 162 F. Supp. 2d at 8; 11th amendment and qualified immunity claims (presented by some of the defendants as an alternative ground for affirmance); and the significance of the intervening decision of the Puerto Rico Superior Court, discussed above, invalidating as *ultra vires* the original decision by the Tourism Company and Exploratorio to empower Prisma Zona to operate the children's museum, *Compania de Turismo,* KAC2001-3380 (506).

Affirmed.

# APPENDIX B

LEXSEE 162 F. Supp. 2d 1

## PRISMA ZONA EXPLORATORIA DE PUERTO RICO, INC., Plaintiff, v. SILA M. CALDERON, et al., Defendant

**CIVIL NO. 01-1836(PG)**

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO**

**162 F. Sup. 2d 1; 2001 U.S. Dist. LEXIS 15502**

**September 14, 2001, Decided**

**September 17, 2001, Filed**

### DISPOSITION:

Defendants' motion to dismiss GRANTED. Case dismissed as to all defendants named in complaint.

### COUNSEL:

For PRISMA ZONA EXPLORATORIA DE PUERTO RICO, INC., plaintiff: Jane A. Becker-Whitaker, Law Offices of Jane Becker, Whitaker, PSC, San Juan, PR.

For PRISMA ZONA EXPLORATORIA DE PUERTO RICO, INC., plaintiff: Luis G. Rullan-Marin, San Juan, PR.

For PRISMA ZONA EXPLORATORIA DE PUERTO RICO, INC., plaintiff: Zoraida Buxo-Santiago, Rullan & Buxo, P.S.C., San Juan, PR.

For SILA MARIA CALDERON, JORGE PESQUERA, defendants: Salvador J. Antonetti-Stutts, Department of Justice of PR, San Juan, PR.

For SILA MARIA CALDERON, JUAN AGOSTO-ALICEA, JOSE V. PAGAN, defendants: Carlos Del-Valle-Cruz, Department of Justice of P.R., San Juan, PR.

For JORGE PESQUERA, THE CHILDREN'S TRUST FUND, GOVERNMENT DEVELOPMENT BANK FOR PUERTO RICO, defendants: Rafael Escalera-Rodriguez, Nestor J. Navas-D'Acosta, Richards & Escalera, San Juan, PR.

**JUDGES:**

JUAN M. PEREZ-GIMENEZ, U.S. District Judge.

**OPINION BY:**

JUAN M. PEREZ-GIMENEZ

**OPINION:**

## OPINION & ORDER

The Court is faced with the task of ruling on defendants' motion to dismiss which presents a myriad of complex legal issues. Having received plaintiff's opposition, the court will analyze and resolve the issues presented by defendants in their motion and during oral arguments. As the court is cognizant of the facts of the case, it opts to discuss them only as they are necessary for a thorough understanding of today's ruling.

## STANDARD OF REVIEW

When ruling on a 12(b)(6) motion a court must accept all well-pled factual averments as true and must draw all reasonable inferences in the plaintiffs' favor. *Berezin v. Regency Say. Bank,* 234 F.3d 68, 70 (1st Cir. 2000); *Negron-Gaztambide v. Hernandez-Torres,* 35 F.3d 25, 27 (1st Cir. 1994). A Court should not dismiss a complaint for failure to state a claim unless it is clear that plaintiff will be unable to recover under any viable theory. *Garita Hotel Ltd Partnership v. Ponce Fed. Bank,* 958 F.2d 15, 17 (1st Cir. 1992). Plaintiff, however, may not rest merely on "unsupported conclusions or interpretations of law". *Washington Legal Foundation v. Massachusetts Bar Foundation.,* 993 F.2d 962, 971 (1st Cir. 1993). "Subjective characterizations or conclusory descriptions of a general scenario which could be dominated by unpleaded facts will not defeat a motion to dismiss." *Coyne v. City of Somerville,* 972 F.2d 440, 444 (1st Cir. 1992). "A complaint must set forth a factual allegation either directly or inferential [sic] respecting each material element necessary to sustain recovery under some actionable legal theory." *Berner v. Delahanty,* 129 F.3d 20, 25 (1st Cir. 1997). *See also Roth v. United States,* 952 F.2d 611, 613 (1st Cir. 1991) (Stating that a plaintiff is obliged to allege facts regarding each essential element necessary to entitle him to recovery). "When a complaint omits facts that, if they existed, clearly would dominate the case, it is fair to assume that those facts do not exist." *O'Brien v. DiGrazia,* 544 F.2d 543 (1st Cir. 1976).

### 1. PLAINTIFF DID NOT COMPLY WITH THE ELIGIBILITY REQUIREMENTS

On July 30, 1999 the Governor of Puerto Rico, Hon. Pedro Rosello, signed a law that created The Children's Trust Fund ("the Fund"). *See* 24 LPRA §§ 3121 *et seq*. The Fund, a non-for profit entity, was created in order to channel the funds that Puerto Rico received as a result of the Smokeless Tobacco Settlement Agreement. The Fund's main objective is to finance programs aimed at the promotion of the welfare of Puerto Rico's youth.

PRISMA, plaintiff of record, is one of the programs that sought funding from the Children's Trust Fund. PRISMA, a private non-profit corporation, was created in order to develop, manage, promote and sponsor a children's museum or interactive center known as "PRISMA zona exploratoria". When the Fund withheld PRISMA's financing after a change in government, PRISMA brought a § 1983 suit claiming political discrimination.

The law that created the Fund ("the trust law") specifically states that an entity cannot receive financial assistance unless it complies with the trust law and the internal regulations subsequently passed by the board of the Trust. See Amended Complaint at p. 11 and 24 L.P.R.A. 3121(e). All beneficiary entities must comply with all operational, administrative, budgetary and other requirements imposed on it by the Trust as a condition for financial assistance.

On September 29, 1999, the board of directors of the Trust approved an internal regulation (the regulation) to establish, among other things, eligibility requirements for beneficiary entities. Said regulation was filed with the Department of State under Num. 6099 on February 22, 2000[1]. Importantly, Article 12 of the regulations provides

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[1] The regulation is entitled: "Regulation for the Establishment of Eligibility Requirements and Monitoring Criteria Under the Law of the

(Continued on following page)

that all beneficiary entities must enter into an assistance service contract with the Trust before receiving financial assistance. Specifically, Article 12 states, in its pertinent part, that:

> " . . . Any financial assistance provided by the Fund is a privilege since the board of directors has exclusive discretion to determine the entities that will receive funding. A financial service contract will be entered into between the fund and the beneficiary entity. The same should have specific clauses delineating the responsibilities of the parties as well as the obligations that the beneficiary entity has as to the use of the funding, the presentation of the necessary reports required by law or regulation and any other that is deemed necessary. The concession of benefits is a privilege and is left to the prerogative of the Fund through its board of directors. Additionally, the contract will contain any other clauses that the board of directors deems necessary."

Defendants claim that plaintiff's failure to enter into a service contract with the Trust makes plaintiff ineligible to receive funding. Because the complaint seeks the disbursement of allegedly due funds and plaintiff is not a beneficiary entity, defendants argue that the complaint fails to state a claim upon which relief can be granted. Defendants' position is a strong one. Any entity that desires to receive funds from the Trust must become a beneficiary entity. To become a beneficiary entity the Trust's own regulation requires a valid service contract.

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Children's Trust Fund; Law Num 173 of July 30, 1999" (translation ours).

Plaintiff has not entered into one. As a consequence, it wasn't even legal for defendants to issue financial assistance to plaintiff.

Plaintiff in opposition makes two arguments. First, it cites *Perry v. Sindermann,* 408 U.S. 593, 597, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972) and *Cuban Museum of Arts and Culture, Inc., v. City of Miami,* 766 F. Supp. 1121 (S.D. Fla. 1991) for the proposition that the lack of an established right to a benefit does not permit the state to deny a benefit on unconstitutional grounds. According to plaintiff, a contract is not needed in order to bring a valid discrimination case. Second, Plaintiff argues that even if there is no valid written contract, there was an oral contract between the parties. The existence of this oral contract is evidenced by the fact that the parties had written out the content of the service agreements but had failed to sign them. Thus, the parties had reached an understanding as to the material elements of the contract. Plaintiff insists that the existence of an oral contract should be enough to shroud any deficiency of form.

The Court is unconvinced by plaintiff's arguments as they fail to effectively answer why plaintiff didn't follow the procedure mandated by the trust law and the regulation. The regulation couldn't be clearer: "A financial service contract will be entered between the Trust and the beneficiary entity". Failure to enter into this financial service contract deprives any entity of funding as "any financial assistance provided by the Fund is a privilege". Entities must comply with the exigencies provided in the regulation prior to any disbursement of funds. Providing financial assistance to any entity without a service agreement, which is basically what the complaint asks this court to do, would not only be unreasonable, but it would be illegal. *Perry,* 408 U.S. 593, 33 L. Ed. 2d 570, 92 S. Ct. 2694 and *Cuban Museum,* 766 F. Supp. 1121 do not change this situation. Neither do citations to Puerto Rican law which validate oral contracts. Oral contracts may be valid in Puerto Rico, but plaintiff must still comply with the regulation in order to be granted financial assistance. Plaintiff failed to do so.

Although this is probably enough to grant defendants' motion to dismiss, defendants' motion presents other points that strengthen today's decision.

## 2. PLAINTIFF HAS SUED THE WRONG PARTIES[2]

The complaint as it relates to some of the defendants must be dismissed because these defendants do not have the power to release the funds sought by plaintiff. The law of the Trust and Regulation # 6099 make clear that the disbursement of funds is the sole prerogative of the Board of Directors of the Trust. As such the complaint must be dismissed as to Jorge Pesquera, the ex-executive Director of the Tourism Company; Milton Segarra Pancorbo, the Executive Director of the Tourism Company; Jose V. Pagan Executive Vice President of the Government Development Bank and The Government Development Bank. None of these entities or persons have any authority to release the funds.

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[2] Although this is one of defendant's strongest arguments, plaintiff in opposition fails to adequately address it.

## 3. PLAINTIFF'S FIRST AMENDMENT CLAIM FAILS

It is well established that political discrimination restrains freedom of belief and association, core activities protected by the First Amendment. *See Elrod v. Burns,* 427 U.S. 347, 354, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976); *Padilla-Garcia v. Guillermo Rodriguez,* 212 F.3d 69, 74 (1st Cir. 2000). In their motion, defendants contend that plaintiff's First Amendment claim should be dismissed because 1) the Supreme Court has refused to recognize a First Amendment protection claim for those who have no prior contractual obligation with the government[3] and 2) defendants have shown that they have a valid reason to withhold funding in compliance with the Supreme Court's ruling in *MT. Healthy City Board v. Doyle,* 429 U.S. 274, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977).

Plaintiff in opposition responds by stating that: 1) the absence of a contract does not allow defendants to discriminate against it[4] 2) in *O'Hare,* a case where the Supreme Court recognized plaintiff's First Amendment Claim, plaintiff did not have a contract but a mutual understanding that the city would maintain O'Hare in the list of service providers. *See O'Hare Truck Service v. City of Northlake,* 518 U.S. 712, 135 L. Ed. 2d 874, 116 S. Ct. 2353 (1996) and 3) even if there is no written contract between the parties there was a valid oral contract between them.

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[3] For this proposition defendants cite *Board of County Commissioners v. Umbehr,* 518 U.S. 668, 685, 135 L. Ed. 2d 843, 116 S. Ct. 2342 (1996) and *McClintock v. Eichelberger,* 169 F.3d 812 (3rd Cir. 1999)

[4] For this proposition plaintiff cites *Perry,* 408 U.S. 593, 33 L. Ed. 2d 570, 92 S. Ct. 2694 and *Cuban Museum,* 766 F. Supp. 1121.

The Court is faced with a situation where it must decipher the First Amendment's impact on the awarding of a governmental benefit or contract. The Supreme Court's pronouncement in *Perry,* 408 U.S. 593, 33 L. Ed. 2d 570, 92 S. Ct. 2694 does suggest that the lack of a contractual right does not, in itself, defeat a First Amendment claim. In *Perry* the Supreme Court emphatically stated that:

> "The first question presented is whether the respondent's lack of a contractual or tenure right to re-employment, taken alone, defeats his claim that the non-renewal of contract violated the First and Fourteenth Amendments. We hold that it does not.
>
> For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number or reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech."

*Perry,* 408 U.S. at 596-97. Thus, the Supreme Court has made clear that the Government cannot withhold a benefit if the decision to withhold is based on unconstitutional grounds even in the absence of a contractual right.

Since 1972, the year when *Perry* was decided, the Supreme Court has had occasion to revisit situations where the plaintiff asserts a First Amendment claim after the government has terminated an existing commercial relationship. In *O'Hare* and *Umbehr* the Supreme Court held that the Government may not terminate an independent contractor's business relationship in order to retaliate against the contractor for the exercise of his political association right. Importantly, the *Umbehr* Court, stated that:

> "Finally, we emphasize the limited nature of our decision today. Because Umbehr's suit concerns the termination of a pre-existing commercial relationship with the government, we need not address the possibility of suits by bidders or applicants for new government contracts who cannot rely on such relationship."

*Umbehr*, 518 U.S. at 685. The *Umbehr* Court thus made it categorically clear that its holding did not apply to applicants or bidders for new government contracts, it only applies to those plaintiffs who can demonstrate that they have a pre-existing commercial relationship with the government. In *Umbehr* the Court refused to extend First Amendment protection to bidders or applicants for government contracts who do not have a pre-existing commercial relationship with the government.

An unbounded reading of Supreme Court's jurisprudence on the subject (*Perry, O'Hare, Umbehr*[5]) leads to the following conclusion of law: the government cannot deny a governmental benefit or contract if it bases that decision on unconstitutional grounds. The First Amendment protects any entity or person (who has been denied a benefit on unconstitutional grounds) if that person has a pre-existing commercial relationship with the government. An actual contract is not needed. The Supreme Court has refused to extend First Amendment protection to bidders or applicants of government contracts. *See* also *McClintock,* 169 F.3d 812 (3rd Cir. 1999) (Refusing to extend First Amendment protection to a bidder or applicant for a government contract).

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[5] For cases dealing with political affiliation in the employment context see *Elrod*, 427 U.S. 347, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (the right to associate with the political party of one's choice is a basic constitutional freedom); *Branti v. Finkel*, 445 U.S. 507, 63 L. Ed. 2d 574, 100 S. Ct. 1287 (1980); *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 111 L. Ed. 2d 52, 110 S. Ct. 2729 (1990).

The question whether the First Amendment affords protection to plaintiff is thus dependent on the type of relationship that the plaintiff has with the governmental agency. Upon review of the record, the Court concludes that PRISMA is at a different position than those plaintiffs who have been afforded First Amendment protection in the past. In all cases where the Supreme Court has recognized plaintiff's First Amendment claim (after plaintiff had been denied a governmental contract or benefit), plaintiffs provided ongoing services or enjoyed a pre-existing commercial/contractual relationship with the government. For example, *Umbehr* and *O'Hare* respectively involved trash hauling and motor vehicle towing, municipal services of an ongoing character. In *O'Hare* the municipality had a list of tow trucks operators which had included Mr. O'Hare for many years. In *Umbehr* plaintiff had been towing trash for six years and his contract automatically renewed unless either party terminated it.

In *Perry,* the collage professor that brought the suit had been employed for over ten years[6].

Plaintiff in this case was negotiating a service contract when the change in government took place. Entering that service contract was legally required in order to be eligible for financial assistance. The service contract would delineate plaintiffs rights vis-a-vis the Trust. The law that created the Trust (and the subsequent internal regulation) empowered the Trust to deny benefits until that contract was entered into. Under these circumstances, the Court can only reach one conclusion: plaintiff was an applicant or bidder for a government contract. In following the Supreme Court's lead in *Umbehr* (which refused to extend First Amendment Protection to bidders or applicants of government contracts), this Court must dismiss plaintiff's First Amendment claim[7].

Nonetheless, even if this Court were to extend the current boundaries of First Amendment jurisprudence there is another reason that compels dismissal of plaintiff's

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[6] The same holds true for *Cuban Museum,* 766 F.Supp. 1121 and *Brooklyn Institute of Arts and Sciences v. City of New York,* 64 F. Supp. 2d 184 (E.D.N.Y. 1999). In *Cuban Museum,* the Museum brought an action against the city of Miami after the city refused to renew its lease. In *Brooklyn Institute,* a contract between the parties provided that the city would pay each year a sum necessary for the maintenance of the museum. Thus, in both of these cases there was a pre-existing commercial relationship between the entities and the government.

[7] In doing so the Court also follows *McClintock v. Eichelberger,* 169 F.3d 812 (3rd Cir. 1999). In *McClintock* the Court of Appeals for the Third Circuit refused to extend First Amendment protection to an applicant for a government contract. The *McClintock* Court stated that "if expansion on the area [first amendment jurisprudence] is to come the source should be the Supreme Court". *Id.* at 817.

First Amendment claim. In *Mt. Healthy,* the Supreme Court established a two part burden-shifting analysis for evaluating free speech claims[8]. *Mt. Healthy,* 429 U.S. at 287. First, the plaintiff must establish a *prima facie* case by demonstrating that he engaged in constitutionally protected conduct, and that this conduct was a substantial motivating factor for the adverse employment decision. Second, once plaintiff establishes his *prima facie* case, defendant is given the opportunity to establish, by a preponderance of the evidence, that it would have taken the same action regardless of the plaintiff's political beliefs. *See Mt. Healthy,* 429 U.S. at 287. If defendant is able to demonstrate that he would have taken the same action regardless of the protected speech, plaintiff's claim fails. In political discrimination cases, defendants bear the burden of persuading the fact finder that its reason is credible. *Padilla Garcia,* 212 F.3d at 78. The evidence by which the plaintiff established his prima facie case may be enough to convince a fact finder that the proffered reason is pre-textual[9]. *Id.*

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[8] *Mt. Healthy's* burden shifting scheme has been applied in the political discrimination context. *See Padilla Garcia,* 212 F.3d 69; *Rodriguez-Rios v. Cordero,* 138 F.3d 22, 24 (1st Cir. 1998).

[9] In this way, political discrimination suits offer a significantly more favorable standard to plaintiff than the ADEA or Title VII. In political discrimination cases "the plaintiff may discredit the proffered nondiscriminatory reason, either circumstantially or directly, by adducing evidence that discrimination was more likely than not a motivating factor". *Padilla Garcia,* 212 F.3d at 77. In Title VII cases plaintiff is required to come forward with affirmative evidence that the defendant's non-discriminatory reason is pretextual. *See Id.; Stephens v. Kerrigan,* 122 F.3d 171, 181 (3rd Cir. 1997) (Explaining the difference between political discrimination and Title VII employment discrimination).

A review of the record reveals that plaintiff's ability for establishing it's *prima facie* case is at best questionable. Notwithstanding the Court need not bother with the intricacies of plaintiff's evidence (or lack thereof) as defendants have demonstrated by a preponderance of the evidence that they would have taken the same action notwithstanding the protected activity. Disbursement of funds can only occur when a written agreement containing conditions, limitations and safeguards is entered between the Trust and a Beneficiary Entity. That contract was never entered into. Under these circumstances defendant could not legally disburse the funding. Plaintiff's First Amendment Claim must be dismissed.

### 4. PLAINTIFF'S EQUAL PROTECTION CLAIM FAILS

Plaintiff's equal protection claim fails for the same reason sketched above. In *Texas v. Lesage,* the Supreme Court of the United States indicated that the Mt. Healthy rule applies with equal vigor to equal protection claims. *Texas v. Lesage,* 528 U.S. 18, 20-21, 145 L. Ed. 2d 347, 120 S. Ct. 467 (1999). As this Court has already ruled that defendants would have taken the same action notwithstanding the protected activity, plaintiff's equal protection claim must be dismissed. The Supreme Court's decision in *Village of Willowbrook v. Olech,* 528 U.S. 562, 145 L.Ed.2d 1060, 120 S.Ct. 1073 (2000) does not change this outcome.

### 5. PLAINTIFF'S DUE PROCESS CLAIM FAILS

Plaintiff's third cause of action alleges that defendants deprived plaintiff of its property without due process of law. "Procedural due process does not apply every time someone is denied a right, privilege or benefit. Rather, in order to be entitled to procedural due process within the meaning of the Fourteenth Amendment, a person must have a protected life, liberty or property interest." *Lara v. Cowan,* 848 F. Supp. 1456 (D. Sriz. [sic] 1994). When resolving procedural due process claims, Courts have traditionally engaged in a two steps analysis. The threshold issue is whether plaintiffs assert a property interest protected by the Constitution. *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 538, 84 L. Ed. 2d 494, 105 S. Ct. 1487 (1985); *Board of Regents v. Roth,* 408 U.S. 564, 574, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972). When a protected issue is identified, the second step is to determine whether defendants deprived plaintiff of that interest without due process. *Loudermill,* 470 U.S. at 542-43.

Property interests subject to due process protection are not created by the Constitution but are created by "existing rules or understandings that stem from an independent source such as state law". *Roth,* 408 U.S. at 577. "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead have a legitimate claim of entitlement to it". *Id.* In order to have a "legitimate claim of entitlement" a person's interest in a benefit must be supported by contractual or statutory language that might be invoked at a hearing". *Perry,* 408 U.S. at 601.

Upon review of the record the Court concludes that plaintiff does not have a legitimate property interest on the monies that were allegedly due to it. As stated before, in order for an entity to become eligible for funding the internal regulations of the Trust demand that a service contract be entered into between the parties. No service contract was entered into between the Trust and PRISMA. As a consequence, PRISMA cannot be said to have a legitimate proprietary interest in the monies. All PRISMA has is a unilateral expectation for the money and an abstract desire for it.

Even if this Court were to stretch the limits of due process protection and find that PRISMA has a proprietary interest in the money allegedly due to it, plaintiff's due process claim would still fail. Although plaintiff insists that the government violated its Fourteenth Amendment rights, plaintiff fails to identify exactly what process was due and not provided. Plaintiff's due process claim fails both the first and the second prong of the procedural due process test.

For all of the above stated reasons Defendants' motion to dismiss is hereby GRANTED. The case is dismissed as to all defendants named in the complaint. The Court has considered all of Plaintiff's arguments and find them to be unpersuasive.

**IT IS SO ORDERED.**

San Juan, Puerto Rico, September 14, 2001.

JUAN M. PEREZ-GIMENEZ

U.S. District Judge

# APPENDIX C

## United States Court of Appeals For the First Circuit

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**No. 01-2612**

PRISMA ZONA EXPLORATORIA
DE PUERTO RICO, INC.,

Plaintiff, Appellant,

v.

SILA MARIA CALDERON, personally and in her official capacity as Governor of Puerto Rico and as President of the Children's Trust Fund; JUAN AGOSTO ALICEA, Honorable, personally and in his official capacity as President Government Development Bank for Puerto Rico, as President of the Board of Directors of the Government Development Bank for Puerto Rico and as Vice President of the Children's Trust Fund.; JORGE PESQUERRA, personally and in his official capacity as Executive Director of the Puerto Rico Tourism Company; JOSE V. PAGAN, personally and in his official capacity as Executive Director of the Children's Trust Fund; THE CHILDREN'S TRUST FUND; GOVERNMENT DEVELOPMENT BANK FOR PUERTO RICO; JOHN DOE; GEORGE DOE 01CV1836; JANE DOE,

Defendants, Appellees

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Before

Boudin, *Chief Judge*,
Bownes, Senior Circuit Judge,
Torruella, Selya, Lynch,
Lipez and Howard *Circuit Judges*.

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## ORDER OF COURT

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November 22, 2002

Appellant's motion "Requesting Leave To File Its Petition For Rehearing in Excess of the Page Limitation" is *granted.*

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeals be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc, be denied.

By the Court:
/s/ Richard Cushing Donovan
Richard Cushing Donovan,
Clerk

[cc: Jane Becker-Whitaker, Esq., Zoraida Buxo-Santiago, Esq., Luis Rullan Marin, Esq., Salvador Antonetti-Stutts, Esq., Carlos Del-Valle-Cruz, Esq., Camelia Fernandez Romeu, Esq., Rafael Excalera Rodriguez, Esq., Nestor Navas-D'Acosta, Esq.]

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## APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

PRISMA ZONA EXPLORATORIA DE PUERTO RICO, INC.

Plaintiff,

v.

HON. SILA M. CALDERON, personally and in her official capacities as Governor of Puerto Rico and as President of the Children's Trust Fund; HON. JUAN AGOSTO ALICEA, personally and in his official capacity as President of the Government Development Bank for Puerto Rico, as President of the Board of Directors of the Government Development Bank for Puerto Rico and as Vice President of the Children's Trust Fund; JORGE PESQUERA, personally; HON. MILTON SEGARRA PANCORBO personally and in his official capacity as Executive Director of the Puerto Rico Tourism Company; JOSE V. PAGAN, personally and in his official capacity as Executive Director of the

Civil No. 01-1836 (PG)

PETITION FOR PRELIMINARY AND PERMANENT INJUNCTION; VIOLATION OF CIVIL RIGHTS AND EQUAL PROTECTION

PLAINTIFF DEMANDS TRIAL BY JURY

Children's Trust Fund; THE
CHILDREN'S TRUST
FUND; and the
GOVERNMENT
DEVELOPMENT BANK
FOR PUERTO RICO,
JOHN DOE, GEORGE
DOE and JANE DOE.

Defendants.

## AMENDED COMPLAINT

**TO THE HONORABLE COURT:**

**COME** [sic] **NOW** plaintiff, **"PRISMA Zona Exploratoria de Puerto Rico, Inc."**, (PRISMA) through the undersigned attorneys, to seek a Preliminary and Permanent Injunction to prevent Defendant's concerted efforts against PRISMA, to arbitrarily, capriciously, vindictively and discriminatorily deny disbursement of PRISMA's operational and capital expenditure funds – earmarked, approved and granted since September 1999 by the previous governmental administration – based on politically discriminatory reasons, in violation of plaintiff's First Amendment, Equal Protection and Due Process guarantees, as well as in violation of the constructive trust established on plaintiff's behalf. For that purpose, plaintiff hereby states, alleges and prays as follows:

### I. PARTIES

1.1 Plaintiff, "PRISMA, Zona Exploratoria de Puerto Rico, Inc." (hereinafter indistinctively referred to as "plaintiff" or "PRISMA-Private") is a private non-profit corporation organized under the laws of Puerto Rico, where it has its principal place of business. Pursuant to its certificate of incorporation and its by-laws, PRISMA-Private was organized to engage in "charitable, scientific, literary, or educational purposes, to foster activities for the welfare of children, and for the prevention of cruelty to children", providing that it would "operate exclusively for activities within the purview of Section 501(c)(3) of the United States Internal Revenue Code and Section 1101(4) of the Puerto Rico Internal Revenue Code."[1] Within that context, PRISMA-Private's by-laws state as its specific purpose "to develop, promote, sponsor, operate and manage the children's museum or interactive center known or to be known as 'PRISMA Zona Exploratoria de Puerto Rico' at the area known or to be known as the 'Distrito del Nuevo Centro de Convenciones' to be developed by the Government of Puerto Rico".[2] The filing of the instant action has been authorized by its Board of Directors to seek the redress of its civil rights, to protect the integrity, objectives and purpose of the Children's Museum and to obtain the disbursement of funds, private or from Defendants, as well as other funds, private or from Defendants, committed to plaintiffs benefit.

1.2 Defendant Sila M. Calderón (hereinafter referred to as "Governor Calderón" or "Calderón") is the Governor of Puerto Rico and, by virtue of the authority vested upon her under Law Num. 173 of July 30, 1999, she is also the President of the Children's Trust Fund. The principal offices of the Children's Trust Fund are located in San Juan, Puerto Rico. As President of this Trust, Calderón acts in said official capacity by virtue of the authority vested upon her by Law 173, *supra*, and the regulations issued thereunder. Ms. Calderón is being sued in both her official and personal capacity as President of the Children's Trust Fund. At all relevant times, defendant Calderón has been acting under color of law and pursuant to her authority as President of the Children's Trust Fund. Ms. Calderón is also sued in her personal and official capacity as Governor of the Commonwealth of Puerto Rico. At all relevant times, defendant Calderón has been acting under color of law and pursuant to her authority as Governor of Puerto Rico.

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[1] Certificate of Incorporation of PRISMA Zona Exploratoria de Puerto Rico, Inc., Article III (**Exhibit I**).

[2] By-Laws of PRISMA Zona Exploratoria de Puerto Rico, Inc., Article I, §§ 1, 2 (**Exhibit II**).

1.3 Defendant Juan Agosto Alicea (hereinafter referred to as "Agosto Alicea") is the President of the Government Development Bank for Puerto Rico (hereinafter referred to as the "GDB"), the President of the Board of Directors of the Government Development Bank for Puerto Rico, and the Vice President of the Children's Trust Fund. The GDB is a public corporation of the Government of Puerto Rico, not entitled to Eleventh Amendment immunity, with its headquarters and principal offices located in San Juan, Puerto Rico. As President and President of its Board, Mr. Agosto Alicea acts in said official capacity by virtue of the authority vested upon him under Law Num. 17 of December 23, 1948, and the regulations issued thereunder. As Vice President of the Children's Trust Fund he acts in said official capacity by virtue of the authority vested upon him under Law Num. 173 of July 30, 1999. Mr. Agosto Alicea is being sued in both his official and personal capacity. At all relevant times, Defendant Agosto Alicea was acting under color of law and pursuant to his authority as President of the GDB, President of the Board of Directors of the GDB and as Vice President of the Children's Trust Fund

1.4 Defendant Jorge Pesquera (hereinafter referred to as "Pesquera") was the Executive Director of the Puerto Rico Tourism Company (hereinafter referred to as "Tourism Company") until sometime on or about June 30, 2001. The Tourism Company is an administrative agency of the Executive Branch of the Government of Puerto Rico, with its headquarters and principal offices located in San Juan, Puerto Rico. As Executive Director he acted in said official capacity by virtue of the authority vested upon him under Law No. 10 of June 18, 1970, and the regulations issued thereunder. Since he no longer holds the position of Executive Director, he is being sued in his personal capacity. At all relevant times, Defendant Pesquera was acting under color of law and pursuant to his authority as Executive Director of the Tourism Company.

1.5 Defendant Milton Segarra Pancorbo (hereinafter referred to as "Segarra") is the Executive Director of the Puerto Rico Tourism Company (hereinafter referred to as "Tourism Company"). The Tourism Company is an administrative agency of the Executive Branch of the Government of Puerto Rico, with its headquarters and principal offices located in San Juan, Puerto Rico. The Executive Director acts in said official capacity by virtue of the authority vested upon him under Law No. 10 of June 18, 1970, and the regulations issued thereunder. He is being sued in both his personal and official capacity. At all relevant times, Defendant Segarra was acting under color of law and pursuant to his authority as Executive Director of the Tourism Company.[3]

1.6 Defendant José V. Pagán (hereinafter referred to as "Pagán") is the Executive Vice President of the GDB by appointment of the President of said institution, and the Executive Director of the Children's Trust Fund, by virtue of the authority vested upon him under Article 8 of Law 173 of July 30, 1999, and the regulations issued thereunder. He is being sued in both his personal and official capacity. At all relevant times, Defendant Pagán has been acting under color of law and pursuant to his authority as Executive Director of the Children's Trust Fund.

1.7 Defendant Children's Trust Fund is a public corporation created as an irrevocable, perpetual, non-profit independent corporate body, with the capacity to sue and be sued and not entitled to Eleventh Amendment immunity. The Children's Trust Fund was created by local law to develop and sponsor programs to promote the welfare of the children and youth, and to which the Government of Puerto Rico has entrusted the funds received and to be received under the terms of the Smokeless Tobacco Master Settlement Agreement, dated November 23, 1998, entered into between the States and territories of the United States of America, and the participating tobacco manufacturers.

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[3] Mr. Segarra's appointment was announced on August 15th 2001 by Governor Calderón. Thus, Defendant Segarra's confirmation by the Puerto Rico Senate to the position of Executive Director of the Tourism Company [sic] still pending.

1.8 Defendant Government Development Bank for Puerto Rico is a public corporation of the Government of Puerto Rico with the capacity to sue and be sued and not entitled to Eleventh Amendment immunity.[4]

1.9 Defendant John Doe whose identity is not known to plaintiff at this time. Defendant John Doe's acts and omissions in concert with, aiding, assisting or otherwise interfering, causing or contributing to the deprivation of plaintiff's rights, as alleged in this Complaint and to causing damages to plaintiffs. Defendant John Doe conspired with other Defendants to maliciously and illegally violate those rights.

1.10 Defendant George Doe whose identity is not known to plaintiff at this time. Defendant John Doe's acts and omissions in concert with, aiding, assisting or otherwise interfering, causing or contributing to the deprivation of plaintiff's rights, as alleged in this Complaint and to causing damages to plaintiffs. Defendant George Doe conspired with other Defendants to maliciously and illegally violate those rights.

1.11 Defendant Jane Doe whose identity is not known to plaintiff at this time. Defendant John Doe's acts and omissions in concert with, aiding, assisting or otherwise interfering, causing or contributing to the deprivation of plaintiff's rights, as alleged in this Complaint and to causing damages to plaintiffs. Defendant Jane Doe conspired with other Defendants to maliciously and illegally violate those rights.

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[4] Article 4 of Law Num. 173 of July 30, 1999.

## II. JURISDICTION AND VENUE

2.1 This Honorable Court has jurisdiction over the parties and subject matter of this controversy under Sections 1331 and 1343 of Title 28 of the United States Code. This Honorable Court also has jurisdiction under the First, Fifth, Ninth, Tenth and Fourteenth Amendments of the United States Constitution.

2.2 This Honorable Court also has jurisdiction over the parties and subject matter of this controversy because Section 1983 of Title 42 of the United States Code Annotated provides persons deprived of the privileges and immunities secured to all citizens and persons within the jurisdiction of the United States by the Constitution and the laws of the United States, with a right to bring suit against all persons acting under color of state law who so deprive them.

2.3 Pursuant to the provisions of Title 28 U.S.C. §§ 1343(e) and 1343(4), actions that arise pursuant to 42 U.S.C. § 1983 may be brought in the district courts of the United States.

2.4 This Court is empowered to enter a Preliminary and Permanent Injunctions [sic] pursuant to Rule 65 of the Federal Rules of Civil Procedure.

2.5 Pursuant to 28 U.S.C. §1367, this Court also has supplemental jurisdiction over all causes of action arising under the Laws and Constitution of Puerto Rico insofar as they stem from the same nucleus of operative facts as their federal counterparts.

## III. STATEMENT OF THE CASE

### 3. An Idea conceived and launched by the New Progressive Party (NPP) administration.

3.1 In May of 1994, then Governor of Puerto Rico Pedro J. Rosselló and his wife, First Lady Irma Margarita (Maga) Nevares de Rosselló, traveled to Costa Rica to attend the inauguration ceremony of the recently elected President, José M. Figueres.

3.2 The Governor and the First Lady also attended the inauguration of the Costa Rican Children's Museum, established as an initiative of the President and First Lady of that country. Governor Rosselló and his wife were so positively impressed by it that, upon their return to Puerto Rico, the Governor decided to provide the children of Puerto Rico with the opportunity to enjoy a one-of-a-kind children's museum in the Island. Rosselló envisioned the establishment of a modern children's museum as part of what would be his legacy to the People of Puerto Rico, and specially to Puerto Rico's children and youth.

3.3 From its inception, as part of his vision of the Government as a facilitator of private initiatives, and in a manner similar to that utilized with the Puerto Rico Museum of Art ("MAPR")[5], Governor Rosselló determined that he wanted the children's museum to be run by a private, non-profit entity, to free the initiative from political partisanship. This mechanism has been used in the establishment of other museums throughout the world, including the Costa Rican Children's Museum.

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[5] The similarity between the Children's Museum and the MAPR goes beyond the fact that they are both run by non-profit, private entities. As will be discussed herein, *infra*, they were both subject to politically motivated takeover attempts by Defendant Calderón through Defendant Agosto Alicea.

3.4 Governor Rosselló asked his Special Aide assigned to the Office of the First Lady, Ms. Annabel Guillén, to begin conducting research and gathering information about children's museums in other states and countries; informally looking for appropriate sites for the museum in Puerto Rico; consulting with museums abroad to learn about their experiences; and, in general, shaping his and the First Lady's idea of establishing a children's museum in the Island.

3.5 Ms. Guillén had been working with Governor Rosselló and the First Lady since he had been in the race for the governorship in 1992, as the NPP's candidate. After he took office, she became part of his staff, always worked closely with the First Lady, and coordinated the public affairs of the Office of the First Lady. The Office of the First Lady is part of the Office of the Governor. As an Aide to the Governor, Ms. Guillén was also held responsible for handling public policy affairs regarding children and youth.

3.6 Ms. Guillén is a longstanding NPP member, with experience in previous NPP government administrations, who became an influential officer during the eight (8) years she worked at the Office of the Governor, Office of the First Lady. Ms. Guillén is married to Rafael Rodríguez Aguayo, a well known NPP member; former Secretary General of the NPP for twelve (12) years; former Aide to

Governor Rosselló during his 8 years in office; former Secretary of Organization and Public Policy[6]; one of the closest political advisors to Rosselló and to many other NPP candidates, including Hon. Luis A. Ferré, Hon. Carlos Romero Barceló and Hon. Baltasar Corrada del Río; and presently a senior member of the NPP Directory, the highest ranking regulating entity within that political party.

3.7 By the first semester of 1998, Ms. Guillén had visited several museums in the mainland. She had been to the Smithsonian Institution to confer with and seek the assistance of Mr. Spencer Crew, Director of the National Museum of American History, seeking the best advice available on museum administration and fund-raising, among other subjects. Ms. Guillén had also visited the biggest and most important children's museum in the United States, located in Indianapolis, Indiana, where she met with Mr. Peter Sterling, President of the Indianapolis Children's Museum. At the recommendation of Mr. Crew and Mr. Sterling, in April of 1998, Ms. Guillén sought advice from Ms. Elaine Heuman Gurian, a world-renowned expert on children's museums, who had been Deputy Assistant Secretary for Museums of the Smithsonian Institution. With Ms. Gurian's advice, the Office of the Governor set certain goals and established the support needed and funding objectives, among other matters.

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[6] Staff position within the Office of the Governor.

3.8 During these visits, Ms. Guillén learned that IMAX theaters were frequently an integral part of children's museums because of the unique educational experiences such theaters provided.

3.9 In January 1999, Governor Rosselló appeared before the Legislature in his State of the Commonwealth Address. Among the major new initiatives to be launched during the year, Governor Rosselló made the first formal announcement of the creation of the new Puerto Rico Children's Museum.

3.10 In March 1999, Ms. Rosselló held a press conference at La Fortaleza to present the details of the Children's Museum project. The First Lady spoke of the special meaning that this project had for her husband and herself; the mission and objectives of the initiative, its importance to education, recreation, and tourism, among others; the manner in which the project would be started; the funding of the museum with money from the Tobacco Settlement Agreement; and the metaphoric name that had been selected for the museum: "PRISMA".

3.11 The Governor, before he joined public service, was a Pediatric Surgeon. The First Lady was a Social Worker and then had three (3) children. Nothing marked their lives as much as their dedication and service to children. These feelings permeated their government initiatives and the Children's Museum represented what they wanted their legacy from public service to be.

3.12 The Tourism Company decided to help the Governor and the First Lady to realize this Project, which was an integral part of the Government's public policy.

3.13 This involvement eventually led the Tourism Company to the creation of a subsidiary, by the name of "PRISMA El Exploratorio de Puerto Rico, Inc." ("PRISMA-Public" to differentiate it from plaintiff PRISMA Zona Exploratoria de Puerto Rico, Inc.).

3.14 In 1999, it was also decided that locating the Children's Museum within the new Convention District – itself an integral component of a major urban redevelopment program known as the Golden Triangle ("Triangulo Dorado") – would significantly enhance the sector's tourism potential.

3.15 The Government's involvement with the Children's Museum was always intended to be temporary (in accordance with Governor Rosselló's vision of empowerment and the role of Government as a facilitator), and all officers of the prior Administration always acted accordingly. *See* ¶¶ 5.2 and 5.3, *infra*.

### 4. The Source of the Funds for the Museum.

4.1 On November 23, 1998, the landmark Smokeless Tobacco Master Settlement Agreement was signed (hereinafter referred to as the "Settlement Agreement").

4.2 On December 8, 1998, an Agreed Motion for Approval of Settlement Agreement and Entry of Consent Decree and Final Judgment, was filed by the parties, including counsel for the Attorney General of Puerto Rico, in representation of the Government of Puerto Rico.

4.3 In accordance with the terms of the Settlement Agreement, the Governor enacted legislation to create the Children's Trust Fund as the recipient of all funds originating from the Settlement Agreement.

4.4 Funds to establish the Children's Museum, beyond those needed to move forward during the preliminary stages of the project, would come from funds assigned to the Government of Puerto Rico from this Settlement Agreement.

## 5. The Preliminary Stages

5.1 In March 1999, the Board of Directors of the Puerto Rico Tourism Company approved a resolution to organize a public subsidiary corporation for the development of the preliminary phase of the Project. Said subsidiary was named "PRISMA El Exploratorio, Inc." ("PRISMA-Public").

5.2 The resolution of the Tourism Company's Board of Directors, Number 99-158 authorizing the creation of PRISMA-Public clearly stated that its purpose would be to "develop the preliminary phases of the Children's Museum" (translation ours).[7]

5.3 On April 15, 1999, PRISMA-Public was "incorporated".[8] PRISMA-Public's Certificate of Incorporation similarly provided, in its Article 3, that "the nature of the business or purpose that are [sic] to be carried out or promoted are: Development of the preliminary phase of the Children's Museum [ ]" (translation ours).[9]

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[7] *See*, **Exhibit III**. This was decided consistent with the Government's original intent that the museum be a private non-profit entity.

[8] This turned out to be unnecessary in light of the Puerto Rico Supreme Court's decision in *Rodríguez Román v. Banco Gubernamental de Fomento*, 2000 TSPR 93.

5.4 On May 6, 1999, Board of Directors of PRISMA-Public approved the appointment of Ms. Annabel Guillén as Executive Director to PRISMA-Public and gave her the authorization to petition the GDB for a $60M line of credit to finance the preliminary stages expenditures, (design and construction of the Project), and to petition the GDB for the disbursement of $3 million for this preliminary phase.[10]

5.5 The source of repayment for this loan would be the monies due to the Government of Puerto Rico from the Settlement Agreement, to be managed by the Children's Trust.

5.6 On May 12, 1999, the GDB approved a $20 million line of credit to PRISMA-Public, and a document to that effect was signed by Ms. Guillén and Ms. Lourdes Rovira, President of the GDB. The source of repayment was clearly identified as the Tobacco Settlement Funds.[11]

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[9] *See*, **Exhibit IV**, Certificate of Incorporation of PRISMA El Exploratorio, Inc.

[10] Ms. Guillén remained an employee of the Office of the Governor, with the additional assignment of working for PRISMA-Public at no additional remuneration from the latter.

[11] *See*, Resolution CE-1302, pursuant to Certification issued by the Secretary to the Executive Committee of the Board of the Puerto Rico Government Development Bank (**Exhibit V**). *See also*, Commitment letter dated May 20, 1999 (**Exhibit VI**).

### 6. The Children's Trust Fund and the Bond Issue

6.1 On July 30, 1999, Governor Rosselló signed the law creating The Children's Trust (also herein referred to as the "Trust"). The express legislative purpose behind the Law creating the Trust was to channel the funds of the Settlement Agreement towards the development of programs aimed at the promotion of the welfare of Puerto Rico's youth. The Legislative Intent of the Act specifies that among the initiatives to be promoted with the Trust's funds were those that further the recreation and education of Puerto Rico's youth. The Children's Museum meets these criteria.

6.2 The Trust's enabling statute makes the GDB's role in its operation clear. That role is, namely, that of a disbursement agent and financial advisor to the Trust "in order to maximize the return of the funds from the [Tobacco Settlement Agreement] in the different capital investment markets." The GDB's role is ministerial and involves no discretion.

6.3 On September 29, 1999, Ms. Guillén, as Executive Director of PRISMA-Public, presented the Children's Museum development plan to the Board of the Children's Trust.

6.4 The Trust resolved to provide the Children's Museum with economic assistance for funds borrowed from the GDB up to the amount of $60 million. Also the Board determined that the economic assistance to be provided by the Children's Trust would eventually be transferred to the private non-profit organization qualified under § 501(c)(3) of the Internal Revenue Code that would continue to develop the Project.

6.5 The Trust is the owner and administrator of the funds received by the Tobacco Settlement Agreement. The Trust exercises its powers independently and in accordance with its enabling statute.

6.6 The funds from the Tobacco Settlement are transferred to the Trust as holder in fee simple, free from any lien or claim on them.

6.7 The ends to which the Trust is created are expressly declared, in the Trust's enabling statute, to be in the public interest. The exercise of those powers by the Trust is also declared to be an essential governmental function.

6.8 The Trust's enabling law defines the term "Projects of the Trust" as initiatives of the Government or of the Beneficiary Entities declared as such by the Trust's Board of Directors. Thus, the ends of the Trust and the ends of the beneficiaries are the same.

6.9 The eligibility of an entity as a "Beneficiary Entity" rests solely on the Board of Directors of the Trust. The authorization for the disbursement of the funds is empowered to the Board of Directors of the Trust.

6.10 A Beneficiary Entity can be a corporation if it meets the requirements of the Children's Trust Law and its regulations.

6.11 Plaintiff met, and continues to meet, the requirements of the Law and of the Children's Trust regulations.

6.12 Plaintiff was named a Beneficiary Entity by the Children's Trust.

6.13 The Trust is expressly authorized to issue bonds to be repaid with the Tobacco Settlement Agreement's payments.

6.14 The Law also states that the proceeds of a bond issue can be used, without limiting them to, the financing of all or part of the costs and expenses of the projects and to lend or otherwise provide funds to Beneficiary Entities including, without constituting a limitation, the payment of all or part of any debt of a Beneficiary Entity.

6.15 The Trust's funds can be utilized for the repayment of obligations of, or to provide assistance to, public corporations that provide infrastructure for the Trust's Projects. The Children's Museum is such a project, ¶ 6.13, *supra*.

6.16 A payment of $9,874,413.46 was made, out of the funds granted to plaintiff as a Beneficiary Entity by the Trust, to the Puerto Rico Tourism Company and/or its Board of Directors and/or PRISMA-Public (collectively referred to as "Tourism") in payment for the transfer of the assets now owned by plaintiff.

6.16a The GDB issued a Funds Transfer Order for the amount of $9,874,413.46.[12]

6.17 The transfer of the assets to plaintiff was based on the actual costs of all of the payments made by Tourism. The breakdown of the costs incurred by Tourism was prepared by Tourism and was so detailed as to include minor expenses such as postage and temporary services.

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[12] See, Funds Transfer Order, Exhibit __.

6.18 Said payment was recognized in the Transfer Agreement between plaintiff and Tourism by stating at pp. 5 and 6 thereof that "Annex A, detailing the total investment made by [Tourism] is attached to and made a part of this [Transfer Agreement] *which investment is repaid by [plaintiff] in its entirety to [Tourism] from funds to be disbursed by the Children's Trust.*" (Translation ours).[13]

6.19 Plaintiff and Tourism agreed to the payment of certain monies involved in pending litigation (including *International Theater Development Company, et als. v. Turismo, et als.*, Civ. 00-2006 (HL), before this Honorable Court, to which the instant plaintiff is a party-defendant). Plaintiff was not charged for the costs incurred by Tourism that are, as agreed to by the signatories, properly chargeable to third parties.

6.20 The Offering Statement (prospectus) of The Children's Trust Fund Tobacco Settlement Asset-Backed Bonds, Series 2000, at p. 56, under the heading "Use of Proceeds" states that "[t]he Trust will apply the proceeds of the Series 2000 Bonds (i) to pay the costs of certain capital expenditures in accordance with the Act, including, but not limited to, the costs of constructing and equipping a children's museum [ ]".

6.20a The Contract of Purchase by and between the CTF, Salomon Smith Barney and Bear Sterns & Co., Inc. states, in Section 1, that "the Commonwealth has transferred to the [CTF] all of its right, title and interest under the Master Settlement Agreement [ ]. The series 2000

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[13] *See*, **Transfer Agreement [illegible]hibit VII.**

Bonds are being issued for the purpose of (a) paying the costs of certain capital expenditures in accordance with the [CTF] Act, including, but not limited to, the costs of equipping and constructing a children's museum [ ]".

6.20b Defendant GDB's General Counsel issued an opinion stating, at ¶ 10, that "[p]ursuant to the [CTF] Act, Puerto Rico has assigned and transferred to the [CTF] absolute title to all payments which Puerto Rico is entitled to receive under the MSA [ ], and Puerto Rico has no legal or beneficial interest in such payments."

6.20c Representations in the Offering Statement were official representations made by the Trust.

6.20d The children's museum referred to in the prospectus is plaintiff's children's museum project.

6.21 A "Tax Certificate" was issued by the Executive Director of the Trust, signed by its then Executive Director, Carlos Colón de Armas. In these documents, the Trust is referred to as the "Issuer".

6.22 The Trust delivered the Issuer's Tax Certificate to Transaction Counsel (also referred to as bond counsel) who relied on the representations and the certifications made therein in rendering its opinion that interest on the Bonds is excluded from gross income for federal income tax purposes. Said opinion was made part of the of the [sic] bond issue.

6.23 The Tax Certificate included, among the "Recitals", the following statements containing specific references to Plaintiff (bolded for easier reference):

The Issuer has determined to issue the Bonds and apply the proceeds thereof and the investment earnings thereon to [ ] (b) make a grant to **Prisma Zona Exploratoria de Puerto Rico, Inc.** ("Prisma") which will be used for the acquisition, construction and equipping of a children's museum in Isla Grande, Santurce, Puerto Rico (**the "Prisma Project"**) to be owned and operated by Prisma, [ ]

The Code, the regulations promulgated thereunder, including final, temporary and proposed regulations (the "Treasury Regulations") and the rulings with respect thereto impose certain limitations on the use and operation of the property financed and refinanced with the proceeds of the Bonds and on the use and investment of proceeds of the Bonds and certain other moneys relating to the Bonds.

[ . . . ]

The Issuer has determined to deliver this tax certificate, inclusive of exhibits (the "Tax Certificate"), to set forth certain facts and estimates that form the basis for the Issuer's, the Department of Education's and **Prisma's** reasonable expectations as to the use and investment of the proceeds of the Bonds and of certain other moneys relating to the Bonds and to set forth certain terms and conditions relating thereto, in order to assure that interest on the Bonds will be excluded from gross income for federal income tax purposes.

[ . . . ]

Section 3. *Purpose of Financing*. The Bonds are being issued pursuant to the Constitution and laws of the Commonwealth of Puerto Rico, including the Act, an Indenture, dated as of October 1, 2000 (the "Indenture"), by and between the Issuer and Citibank, N.A. (the "Indenture Trustee"), a supplement to the Indenture, dated as of November 15, 2000 (the "Series 2000 Supplemental Indenture") between the Issuer and the Indenture Trustee and a resolution adopted by the Board of Directors of the Issuer on October 26, 2000 (the "Resolution"), to provide funds which will be used to:

(a) pay costs of the Project; [The term "Project" is defined to include the **Prisma Project.**]

[ . . . ]

The Issuer covenants to use the proceeds of the Bonds solely for the above-described purposes unless an opinion of Transaction Counsel is received with respect to permitted uses of proceeds for other than the above-described purposes. The Department of Education and **Prisma** have each covenanted in their certificates attached hereto as Exhibits B and C, respectively, and all Qualified Grantees will covenant in their respective contracts with the Issuer (the "Initiative Contracts") that proceeds derived from the sale of the Bonds and paid to the Department of Education, **Prisma** and the Qualified Grantees, respectively, together with the investment earnings thereon, will be applied to pay costs of the Department of Education Project, **the Prisma Project**, and the initiative Project, respectively, or allocated to expenditures for such costs, unless an opinion of Transaction Counsel is received with respect to permitted uses of proceeds other than as described herein and in Exhibits B and C attached hereto.

PART A. IN GENERAL

Section 4. *Reasonable Expectations and Reliance on Other Parties*. The expectations of the Issuer, which are based in part on the expectations of the Department of Education and **Prisma**, concerning certain uses of proceeds derived from the sale of the Bonds and certain other moneys described herein and other matters are based in whole or in part upon computations and representations of Salomon Smith Barney [ ]. The Issuer, the Department of Education and **Prisma** are relying in good faith upon such computations and representations on the bases of the reputable business practices and prior business dealings (as applicable) entered into with such parties by the Issuer, the Department of Education and **Prisma**. The Issuer is not aware of any facts or circumstances that would cause it to question the accuracy or reasonableness of such computations or representations.

[ . . . ]

PART B. USE OF PROCEEDS AND OTHER FUNDS; SECURITY; AND YIELD.

Section 1.

[ . . . ]

[ . . . ] (a) *Sale Proceeds and Accrued interest*.

(iv). $349,050,000.00 of such proceeds will be deposited into the accounts of the Issuer with GDB established for each the Department of Education Project, **the Prisma Project** and the Initiative Project (collectively, the "Project Account") and will be applied to pay costs of the Project within three years of the date hereof;

Section 2. *Proceeds Used to make Grants.* The portion of the proceeds of the Bonds used to finance **the Prisma Project** and the Initiative Project will be used to make grants (the "Grants") **to Prisma** and Qualified Grantees, respectively (the "Grantees")

[ . . . ]

Section 9. *Universal Cap* [ . . . ]

[ . . . ]

(b) *Requisition Procedures.* The Department of Education, **Prisma** and Grantees shall submit a requisition, on forms prescribed by the Issuer, for the disbursement of the proceeds of the Bonds. With respect to each expenditure the Department of Education, **Prisma** and the Grantees shall provide the following information, as well as any other information requested on the forms provided by the Issuer: (1) description of the asset, (2) cost of the asset, (3) the economic life of the asset financed, (4) whether any portion of the cost is being paid to employees of the Department of Education, **Prisma** or the Grantee, (5) the name of the vendor, [. . . . ]

(c) *Disbursements.* The disbursement of proceeds of the Bonds for a project cost will be (1) made only after the Grantee has submitted a requisition form that contains all of the information set forth in subparagraph (b) of this section 10 and will only be paid only after presentation of evidence (e.g. cancelled check or receipt of payment) that such expenditure has been paid by the Department of Education, **Prisma** or a Grantee as applicable, and [ . . . ]

## PART D. RESTRICTIONS ON NON-GOVERNMENTAL USE, ELECTION TO TREAT PORTION OF BONDS AS 501(c) (3) BOND.

Section 1. *Governmental Use of Proceeds*. Based in part on the representations of the Department of Education set forth in its Certificate attached hereto as Exhibit B and based in part on the representations of Prisma set forth in its Certificate attached hereto as Exhibit C, the Issuer represents herein the following with respect to the use of the proceeds of the Bonds and the facilities financed or refinanced therewith.

[ ]

## PART E. REPRESENTATIONS

Section 3. *No Sale or Disposition; No Change In Use*. The Issuer expects, based on representations of the Department of Education, **Prisma** and the Qualified Grantees, that the Department of Education, **Prisma** and the Qualified Grantees each expect to own and operate and do not expect to sell or otherwise dispose of the Department of Education Project, **the Prisma Project** and each Qualified Grantee's Project, respectively, or any component thereof, prior to the final maturity date of the Bonds of July 1, 2026. The Issuer represents, warrants and covenants, based on representations of the Department of Education, **Prisma** and the Qualified Grantees, that the facilities financed and refinanced with the proceeds of the Bonds will be used for governmental purposes, during the period of time the Bonds are outstanding, unless a favorable opinion of Transaction Counsel is received with respect to any proposed change in use of the Project. [ . . . ]

> [. . .]
>
> Section 9. *Time Test and Due Diligence Test.* The Issuer, the Department of Education and **Prisma** have incurred or will incur within 6 months of the date hereof substantial binding obligations, which are not subject to contingencies within the control of the Issuer, the Department of Education or **Prisma** or a related party, to third parties to expend at least 5% of the net sale proceeds of the Bonds on the Project.[ . . . ]

6.24 Defendant Trust Fund caused plaintiff to issue a similar Tax Certificate in order to conduct the bond issue concerning the use of funds by plaintiff. Plaintiff's Tax Certificate was duly signed by Mr. José E. Vélez, President of the Board of Directors.

6.24a The Governor of Puerto Rico, Hon. Pedro Rosselló, executed an "Approval of Applicable Elected Representative" on November 13, 2000, regarding the issuance of the Series 2000 bonds, in which he states the extract of the testimony of a public hearing which was held in order to determine public reaction to the issuance by the [CTF of the Series 2000 bonds], to provide funds, a portion of which will be used (1) to make (a) a grant to Prisma Zona Exploratoria de Puerto Rico, Inc. to finance the acquisition, construction and equipping of a children's museum (the Children's Museum Project") as and at the location more fully described in the Notice of Public Hearing, a copy of which Notice is attached hereto [ ]." The Notice, published in the San Juan Star on September 29, 2000, states that "[a] portion of the proceeds of the Bonds will be used (1) to make a grant to Prisma Zona Exploratoria de Puerto Rico, Inc. ("Prisma") to finance all or a portion of the costs of the acquisition, construction and equipping of a children's museum situated on an approximately 7 *cuerdas* parcel of land, which was part of the Old Naval Station, and is bounded [description of the physical location] which will be owned and/or operated by Prisma, [and] will consist of four buildings with a total multimedia library, a museum shop, a temporary exhibition hall, a multipurpose/performance hall, a science and technology pavilion, biodiversity pavilion, an arts and culture pavilion, a toddler zone, and an exploration park; [ ]"

6.25 The date of the bond issue was on or about November 15, 2000.

6.26 Defendant's failure to disburse to PRISMA-Private the monies generated by the bond issue in accordance with the terms of the prospectus, constitutes an alteration of the representations and/or terms contained in said prospectus.

6.27 Upon information and belief, Defendants have not obtained a letter from Transaction Counsel prior to altering the representations that were included as part of the bond issue.

6.28 Before the bond issue, the Trust advised the GDB that it had authorized, by resolution, the issuance of $397,005,000.00 in Tobacco Settlement Asset-Backed Bonds, Series 2000 for the purpose of providing moneys "to pay the costs of certain capital expenditures in accordance with the enabling legislation of the [CTF] Trust including, but not limited to, the costs of [ ] (b) the acquisition, construction and equipping of a children's museum consisting of four buildings with an IMAX theater, a butterfly pavilion, a multimedia library, a museum shop, a temporary exhibition hall, a multipurpose performance hall, a science and technology pavilion, biodiversity pavilion, an arts and culture pavilion, a toddler zone, and an exploration park in Isla Grande, Santurce, Puerto Rico, to be owned and operated by Prisma Zona Exploratoria de Puerto Rico, Inc. [plaintiff herein]". Said Resolution was Resolution No. 2000-09 duly adopted by the Board of Directors of the CTF on October 26, 2000, with quorum present.

6.28a On October 26, 2000, the Executive Committee of the Board of Directors of defendant GDB adopted Resolution EC-1450 that includes among its recitals that the CTF has advised the GDB of its Resolution, mentioned in the preceding paragraph, including the same description of plaintiff's project and resolving that "all other essential factors of said bond issue are hereby approved."

6.29 The enabling statute of the Trust states that "the product of the sale of the bonds for each emission will be disbursed in the manner and under the restrictions, if any, that the Trust may dispose in the resolution or resolutions authorizing the bond issue or in the Indenture agreement guaranteeing such bonds."

6.30 The requirements for the disbursement of the funds of the grant made to plaintiff are detailed at ¶ 6.23, Section 9, subparagraph (b) (*"Procedures For Expenditure of Proceeds."*), and (c) (*"Requisition Procedures."*), supra.

6.31 When plaintiff started requesting disbursements, plaintiff was informed by Defendant GDB that the form referred above (for the disbursement of funds) had not been prepared. Defendant GDB instructed plaintiff to prepare the form. Plaintiff complied and all pending requests for payments have complied with, or substantially complied with, these requirements. Other requests for disbursement not currently pending before the GDB or the Trust was the result of such Defendant's refusal to receive the documentation submitted by plaintiff.

6.32 Defendant GDB and/or Trust have, nonetheless, refused to issue payments thereon.

6.33 During the month of December 2000, plaintiff and the CTF started negotiations on the terms of the Service Agreement to be executed among them for the disbursement of the funds. The CTF utilized this juncture to prepare a standard form contract for all grantees and discussed it with plaintiff on numerous occasions.

6.34 On or about the afternoon of December 28, 2000, the CTF, submitted for plaintiff's review, two contracts, one for the capital funds grant and a operational funds grant. Ms. Guillén, as Executive Director, made minor changes to the proposed terms and faxed them to Mr. Carlos Colón de Armas, Executive Director of the CTF, early in the evening of that same day. At that time, the parties had agreed to the terms of the Service Agreement and the only action needed was the non-discretionary ministerial act of signing the agreement.

6.35 In answering the due diligence questionnaire for the Tobacco Settlement Asset-Backed Bonds, Series 2000, at page 2, the Trust described the GDB's role in its "day to day management"[14]:

> [ ] GDB personnel conducts the day to day management of the Trust's operations. GDB provides management, accounting services, cash

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[14] See Exhibit VII(A).

management and investment and paying services agent services to the Trust.

[ ]

[ ] The Trust received on June 16, 2000, 200 proposals, of which the Executive Director recommended, and the Board of Directors awarded, 99 proposals. Out of these 99 awards, 61 require funds for capital expenditures as reflected in *Exhibit 1.*

The [GDB's] Compliance Department, directed by Ms. Luisa Wert Serrano, prepared the Trust's Regulation 6099 (see question 7, below) and proposal guidelines. It is currently in the process of developing disbursement, monitoring and compliance procedures. It is also in the process of drafting contractual provisions to be incorporated in the Grant Contracts to be entered with the grantees. The procedures and contract terms will take into account the requirements of the Bond Issue and the United States Internal Revenue Code, where applicable, in addition to Act No. 173 and Regulation 6099. The [GDB's] Preintervention Department will monitor disbursements from the Trust for capital assets.

### 7. "PRISMA Zona Exploratoria de Puerto Rico, Inc."

7.1 On September 2, 1999, three (3) private citizens incorporated "PRISMA Zona Exploratoria de Puerto Rico, Inc." (PRISMA-Private), as a non-profit private corporation with the specific purpose of developing, promoting, sponsoring, operating and managing a "children's museum or interactive center known or to be known as 'PRISMA Zona Exploratoria de Puerto Rico' at the area known or to be known as the 'Distrito del Nuevo Centro de Convenciones' to be developed by the Government of Puerto Rico". All three (3) incorporators were citizens identified with the NPP.

7.2 In accordance with PRISMA-Private's certificate of incorporation and by-laws, the Governor made the first appointments of all nine (9) members of the corporation's Board. Only one (1) of the three (3) incorporators was selected to become a member of the Board. Subsequent appointments would be made by Board members, among themselves.

7.3 The Governor did not make political affiliation a requirement for appointment to this Board, and made his choices based on qualifications and interests.

7.4 On October 7, 1999, PRISMA held its groundbreaking ceremony. Both Governor Rosselló and First Lady Maga Nevares de Rosselló addressed the audience stating how much this Project meant to both of them. This joint appearance was very unusual and underscored how important the museum was to them.

7.5 On May 18, 2000, PRISMA-Private's Board of Directors authorized its President, Mr. José E. Vélez (hereinafter referred to as Mr. Vélez), to begin negotiations with the Tourism Company to acquire the in-progress project from the latter's subsidiary, PRISMA-Public.

7.6 On June 16, 2000, PRISMA-Private presented a proposal to the Children's Trust Fund, petitioning for a grant of $60 million to acquire from PRISMA-Public and continue building the Project. The proposal was presented by the President of PRISMA-Private Board, Mr. Vélez.

7.7 Mr. Vélez had been involved with the Project since its inception. He is a longstanding and well known NPP member, and is currently the President of the Board of Directors of PRISMA-Private.

7.8 PRISMA-Private's proposal was approved and the decision documented in a Resolution of its Board of Directors.

7.9 The Trust Fund also approved $17.5 million for PRISMA-Private's operational and administrative expenses. The $17.5 million grant was approved to cover operating and administrative expenses for the first three (3) years of operation, based on a ten (10) year operating budget presented to the Trust Fund.

7.10 On November 29, 2000, a transfer agreement between PRISMA-Private, PRISMA-Public, the Tourism Company and the Board of the Tourism Company was signed. Through this agreement, PRISMA-Private acquired all of the assets of PRISMA-Public, and compensated the Tourism Company for said assets through a reimbursement transaction performed by the GDB. Through this transaction, Tourism received $9.8 million in payment for the assets transferred.

7.11 The validity of the type of transaction contemplated in the transfer agreement had been the subject of an opinion rendered by Puerto Rico's Attorney General, concluding that there was no legal impediment to that transaction.[15]

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[15] *See* **Exhibit VIII**.

7.12 As soon as the GDB received the money from the Settlement Agreement, it proceeded to cancel the Tourism Company's line of credit that had been approved to fund the initial development stages of the Children's Museum.

7.13 The GDB disbursed the monies to pay for invoices up until on or about January 2001.

7.14 The money disbursed was used to build the planned science exhibition portion of the Museum which included interactive hydraulic equipment, a flora and fauna area, a music pavilion and an area designed to instruct children about environmental issues.

7.15 During the month of December 2000, PRISMA-Private submitted duly approved construction certifications to the GDB.

7.16 During the month of January 2001, PRISMA-Private attempted to submit duly approved construction certifications to the GDB. The GDB refused to accept those invoices and informed PRISMA-Private representative to cease submitting construction certifications until further notice.

7.17 To date, no such notice has been received and all invoices remain outstanding.

7.18 Pending invoices have accrued high interest charges due to Defendants GDB's and the Trust's deliberate delay in payment.

7.19 Defendant's refusal to disburse the funds from the Trust is tantamount to denying PRISMA-private any hope of survival.

### 8. The Popular Democratic Party (PDP) wins the November 7, 2000, general elections.

8.1 Defendant Calderón, the PDP candidate, was elected Governor. Calderón's political campaign promised to target some of Rosselló's major projects and investigate them for alleged misuse of public funds and corruption.

8.2 Defendants were well aware of the Project and the fact that former employees of the Office of the Governor, and other persons identified with the NPP, had been employed by PRISMA-Private.

8.3 During the transition meetings held in December of 2000, between representatives of Governor-Elect Calderón and the outgoing Administration, members of the PDP transition team exhibited an inquisitorial and negative attitude towards PRISMA-Private and the Children's Museum when discussing the subject with Mr. José Corujo, Executive Director of the Tourism Company under the NPP administration.

8.4 Defendants had a politically motivated discriminatory animus against PRISMA-Private's Project and the persons associated with it since before they became public officials in early 2001.

8.5 Defendants were aware that Ms. Guillén and Mr. Vélez were heading the Children's Museum initiative and that there were other NPP members, including some former employees of the Office of the Governor, working for PRISMA-Private.

8.6 Due to the close identification of the Project with Governor Rosselló, First Lady Maga Nevares de Rosselló and the NPP, Defendants actively participated in concert and accord to put into action a [sic] arbitrary, capricious, vindictive and discriminatorily motivated scheme against PRISMA-Private, including directly or indirectly providing false and/or misleading information to third parties and to the press with the sole purpose of irreparably harming plaintiff's goodwill and reputation, destroying the Project and, either, taking over the Project by taking over PRISMA-Private or destroying it.

### 9. "Let's talk about another thing now."

9.1 Defendant Calderón was sworn in as Governor of Puerto Rico on or around January 2, 2001.

9.2 Sometime between January the 4 and January 17, Defendant Agosto Alicea called Mr. Juan Bauzá – who was a member of PRISMA-Private's Board of Directors and involved in its fundraising efforts – and told him that he wanted to talk with him about PRISMA-Private and the Project.

9.3 Mr. Bauzá agreed to meet with Defendant Agosto Alicea but told him that Mr. Vélez, President of PRISMA-Private's Board, should be present at the meeting.

9.4 Mr. Bauzá also told Agosto Alicea that PRISMA-Private needed the GDB to disburse the funds for the Project's survival.

9.5 Defendant Agosto Alicea agreed to meet with both Mr. Bauzá and Mr. Vélez at the GDB offices.

9.6 Defendant Agosto Alicea has known Mr. José Vélez for over twenty (20) years, and is well aware of his NPP political affiliation, as well as of the strong public support that Mr. Vélez has given to the NPP and to NPP candidates throughout his life.

9.7 On or about January 17, 2001, the meeting between Defendant Agosto Alicea, Mr. Bauzá and Mr. Vélez was held at the GDB.

9.8 Mr. Vélez explained the Project to Agosto Alicea and stressed how important it was for PRISMA-Private to have the GDB disburse the grant funds and pay for the already approved certifications pending before the Bank. Mr. Vélez also informed Agosto Alicea about pending payments on work already done by the contractor, Constructora Santiago, Corp.

9.9 Defendant Agosto Alicea stated that he had no objection to the project, but that first he had to audit the operations before disbursing any of the grant funds. Such an audit was not required to any of the other grantees which had funds approved by the Trust.

9.10 Mr. Agosto Alicea informed Mr. Bauzá and Mr. Vélez that a private company, selected by him, would audit all the transactions since the beginning of the Project.

9.11 Defendant Agosto Alicea informed Mr. Vélez and Mr. Bauzá that he had selected an audit company "of his trust" ("de su confianza") that would "report to him". Agosto Alicea told Mr. Vélez that the audit company was headed by a good friend of his, Mr. Pedro Morazzani.

9.12 Defendant Agosto Alicea assured Mr. Vélez and Mr. Bauzá that the audit would be completed by February 15, 2001.

9.13 Agosto Alicea also told Mr. Vélez that regardless of the results of the audit, the final decision with respect to plaintiff would be made "by Fortaleza".

9.14 At another point during the meeting Agosto Alicea said that "the decision [concerning plaintiff] comes from above".

9.15 Mr. Vélez, Mr. Bauzá and Defendant Agosto Alicea discussed, at length, the Children's Museum and PRISMA-Private. After they had finished discussing the substance of the Project, to Mr. Agosto Alicea's satisfaction, Mr. Agosto Alicea turned to Mr. Vélez and said: "Well Joe, let's talk about another thing now".

9.16 Immediately after saying that, Mr. Agosto Alicea essentially stated the following "You have Annabel as Executive Director, who was assistant to Maga in Fortaleza; she is married to Rodríguez Aguayo, former Secretary of the [NPP] party; and that is a problem".

9.17 To those expressions Mr. Vélez responded: "The [Children's Museum] project is bigger than the persons, and we have no sacred cows. But let us wait on that decision until after the audit is completed."

9.18 Defendant Agosto Alicea stated that he understood the Museum's Executive Director's position to be a political one (even though PRISMA-Private is a private entity) and that the decision about who would occupy it would come from Governor Calderón herself.

9.19 Defendant Agosto Alicea asked Mr. Vélez to provide him with the names of the Board members.

9.20 Upon being informed that there were three (3) vacancies in PRISMA-Private's Board, Mr. Agosto Alicea told Mr. Vélez that since Governor Rosselló had named the rest of the Board, Agosto Alicea thought it would be fair if Governor Calderón suggested the names for all available vacancies. Mr. Vélez said that "he had no problem with that."

9.21 Agosto Alicea said that he would talk to Governor Calderón and to [Chief of Staff] César Miranda, and that he would call him [Mr. Vélez] next day to give him the names.

9.22 Agosto Alicea told Mr. Vélez that, after talking to Calderón and Mr. Miranda he could be asking him (Mr. Vélez) to contact the three (3) candidates.

9.23 The following day, January 18, 2001, Mr. Agosto Alicea told Mr. Vélez that the three (3) persons to be appointed to PRISMA-Private's Board were: Mr. Luis Beauchamp, Mr. Alfredo Salazar, and Ms. Luz Pérez, and that he was authorized to contact them.

9.24 Mr. Vélez had informed Ms. Guillén of Agosto Alicea's statements, and she said she would prefer to leave the museum than to jeopardize the project.

9.25 Two (2) days after the meeting between Defendant Agosto Alicea, Mr. Bauzá and Mr. Vélez, the auditors arrived at PRISMA-Private's offices.

9.26 The auditors started asking for information and records, including confidential personnel files, and interviewing personnel.

9.27 Ms. Guillén was interviewed several times and was asked questions that were unrelated to administrative issues. Those questions were mainly related to public policy-making matters.

9.28 On various occasions the interviewing auditor apologized to Ms. Guillén because, as the auditor stated, he was not asking for information that was typical of an audit process, but that he had been instructed by Agosto Alicea to make certain inquiries that were political in nature.

9.29 During the audit period, Defendant Agosto Alicea also made separate, direct requests to plaintiff for information, most of which was political in nature.

9.30 All attempts made by Ms. Guillén to have direct personal contact with Agosto Alicea or his representatives were fruitless.

9.31 All of the information requested was provided with two major exceptions: (1) that contained in incomprehensible requests; and (2) information on which she had confidentiality constraints, such as the request by Defendant Agosto Alicea for personnel files of all of PRISMA's employees.

9.32 At no time did Defendant Agosto Alicea provide a copy of the final audit report to Mr. Vélez, as agreed in the January 17th meeting, nor to any PRISMA-Private representative.

9.33 During the same period of time, PRISMA-Private's Executive Director made several attempts to contact Defendant Pesquera, by calling to his office to request a meeting.

9.34 All calls by Ms. Guillén to Defendant Pesquera went unanswered.

9.35 Ms. Guillén wrote three letters to Defendant Pesquera requesting a meeting and citing the Tourism Company's obligations to forward information to PRISMA-Private under the Transfer Agreement. Two of those letters – one dated February 21, 2001, and a second dated May 3, 2001 – were copied to Defendant Agosto Alicea.

9.36 All letters from plaintiff to Defendant Pesquera went unanswered.

9.37 Four (4) days after Ms. Guillén sent the last letter to Defendant Pesquera, on May 7, 2001, Agosto Alicea and Pesquera held a joint press conference where they announced that the Tourism Company had just filed suit before the Puerto Rico Superior Court seeking a declaratory judgment declaring null and void the Transfer Agreement entered into between PRISMA-Private and the Tourism Company.[16] Such a declaration would have the effect of depriving plaintiff of all of its assets.

9.38 The suit filed by the Tourism Company in state court is part of a concerted effort to deprive PRISMA-Private of all of its assets and to deprive plaintiff of funds from the Trust essential to its continued operation and to PRISMA-Private's mission to develop and operate the Children's Museum.

9.39 These arbitrary, capricious, vindictive and discriminatory actions are directed towards depriving a private entity, PRISMA-Private of its property (the Trust assigned funds and the transferred assets) in order for Defendants to achieve their goal of taking over the project and/or destroying PRISMA-Private.

9.40 Other examples of such actions include the statements by Defendant Agosto Alicea, together with

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[16] *See* **Exhibit IX**.

Defendant Pesquera, when announcing the lawsuit filed against PRISMA-Private before the Puerto Rico Superior Court.[17] Defendant Agosto Alicea stated that:

> The rest of the projects of the Trust, there are a series of initiatives that involve a group of not for profit entities that we are recommending that they go ahead because they are institutions that submitted proposals and more or less in November and December 2000, they were approved by the prior administration. We are reviewing one by one the not for profit institutions. It seems to us that those institutions are doing a good job related to children . . . the money that had been assigned to them. We are going to honor that commitment with the not for profit associations. There are 99 initiatives, but there are some government initiatives and the government initiatives we are not going to realize them.

9.41 Defendant Agosto Alicea and Pesquera's statements at the press conference evidence the Defendant's understanding and position that:

1. a total of 106 proposals had been approved by the Children's Trust Fund;

2. of those 106 proposals, 6 had been presented by government agencies and 100 by private entities;

3. that funds for government proposals would not be disbursed, and that all approved proposals from the private sector, other than PRISMA-Private's, would receive their funds;

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[17] *See* the transcript of the press conference included as **Exhibit X**.

4. that PRISMA-Private's proposal had been approved by the Trust;

5. that the GDB and/or the Trust Fund would not disburse the funds to plaintiff due to the results of the audit and the case filed by the Tourism Company.

9.42 PRISMA-Private has not received money from the Government of Puerto Rico.

9.43 PRISMA-Private has not spent any public funds.

9.44 All of the funds expended by PRISMA-Private have been privately-sourced, unrestricted funds.

9.45 Any irregularities involving public funds identified in the audit would be the sole responsibility of the Government of Puerto Rico.

9.46 Basing the actions taken against plaintiff on the audit or the alleged misuse of public funds (for which PRISMA-Private is not responsible) is arbitrary, capricious vindictive and discriminatory and, by making those allegations public, harmed plaintiff's reputation and good will. Plaintiff was never afforded the opportunity to respond to the audit even though plaintiff requested such an opportunity repeatedly.

9.47 Upon information and belief, Defendants Calderón and Agosto Alicea, or a person or persons acting on behalf of either or both of them, instructed Defendant Pesquera to file the suit against PRISMA-Private in state court.

9.48 Such filing is an integral part of Defendant's concerted efforts to deprive plaintiff of its rights.

9.49 Defendant Pesquera's actions, in concert with the other Defendants, in filing suit against PRISMA-Private are in violation of PRISMA-Private's civil rights and *ultra vires,* since he lacked authorization from the Board of Directors of the Tourism Company to proceed in a manner inconsistent with resolutions approving the transfer. In particular, the Resolutions are Prisma-Public's Board of Director's Resolution Number 01-08 and 01-09, and the Tourism Company's Board of Director's Resolutions Number 01-114 and 01-115. These Resolutions have not been revoked or amended.

9.50 Filing suit against PRISMA-Private clearly violates the terms of the Transfer Agreement and constitutes arbitrary, capricious, vindictive and discriminatory actions.

9.51 As part of the discriminatory scheme, Defendants Calderón, Agosto Alicea and Pagán have refused to proceed with the disbursement of funds in favor of PRISMA-Private even though they have no authority in law to do so.

9.52 By Agosto Alicea's public statements he, and the other Defendants, have *de facto* revoked the resolution approved by the Trust's Board and signed by former Governor Rosselló illegally, without authority, in contravention of the constructive trust created for the benefit of PRISMA-Private, in contravention of the Government's obligations pursuant to the Trust's bond issue, in violation of the covenants and agreements reached between plaintiff and defendants in violation of plaintiff's civil rights and with the negligent or intentional effect of harming plaintiff's reputation and good will.

9.53 Upon information and belief, such actions have been taken without previously obtaining a resolution from the Trust to that effect.

9.54 The effects these actions have had on plaintiff go beyond the denial of the construction and operation funds; beyond attempts to deprive PRISMA-Private of all of its assets; beyond putting a stranglehold on plaintiff; and beyond destroying plaintiffs reputation and that of its employees. Defendants have, in addition, foreclosed any possibility plaintiff had to access private funds for its survival.

9.55 Private fund-raising has always been a major part of PRISMA-Private's efforts to achieve its goals and are essential to its survival. But private donors are aware of the actions taken by the Government and the arbitrary, capricious, vindictive and discriminatory actions taken against plaintiff. Numerous newspaper articles containing such statements have been printed.

9.56 Private donors are aware that these actions stem from the close relationship of this Project and its officers to the Rosselló administration and how that has incurred the wrath of Defendants. No private donor wishes to incur the wrath of the Government by associating itself with plaintiff or with its alleged corrupt and illegal practices, as Defendants would have them believe.

9.57 PRISMA-Private was well aware that it could not be successful in its efforts to complete and operate the Children's Museum unless an endowment fund could be established. PRISMA-Private plans entail the use the Trust's grant to operate for 3 years (amounting to $17.5 million) to ensure that all donations could be directed towards the creation of an endowment fund.

9.58 PRISMA-Private immediately began to solicit funds from private donors and had the goal of raising $15 million in 5 years.

9.59 Plaintiff was well into achieving that goal when Defendants stepped into the picture.

9.60 The Pfizer Foundation (Pfizer) committed to donate one million dollars over a five year period.

9.61 Another private donor gave $250,000.00.

9.62 PRISMA-Private's contacts in Washington D.C. began the process of seeking grants from the National Endowment for the Arts, the National Endowment for the Humanities, the National Science Foundation, and the Institute of Museum and Library Sciences. The grant proposals were welcomed because Puerto Rico is classified as an undeserved [sic] community.

9.63 The National Aeronautics and Space Administration (NASA) made a preliminary commitment to fund an exhibit aimed at teaching children about the sun and its relationship with the Earth.

9.64 Ms. Marjorie Ferraiouli, PRISMA-Private's Director of Strategic Development, began planning the Museum's opening Gala. Ms. Ferraiouli discussed the matter with the President of Banco Bilbao Vizcaya Argentaria ("BBVA"), and he indicated that BBVA was interested in being the major sponsor to the event.

9.65 Other potential donors that had been contacted (many of which voluntarily contacted PRISMA-Private to indicate their desire to help through donations) were:

Toyota, Coca Cola, Triple S, Siemens, Microsoft, Time-Warner, Inc., Merck and the Constructor's Association, among others.

9.66 PRISMA-Private had, by the time Defendants assumed power, received approximately $650,000.00 in donations, donations that have allowed PRISMA-Private to survive so far.

9.67 Predictably, once Defendant's [sic] actions were known, donations dried up. BBVA canceled its participation in the Gala, Pfizer suspended payments, Toyota's campaign and donations were "postponed", attempts to reach other donors have gone unanswered. PRISMA-Private estimates 2 million dollars in donations have been lost.

9.68 PRISMA-Private's fund-raisers began to hear what has now become all too familiar: "we would like to help but not until you solve your problems with the Government." PRISMA-Private's only problem with this proposition is that it entails surrendering their property to Defendants, surrendering themselves to Defendants and accepting all of Defendant's arbitrary, capricious, vindictive and discriminatory actions in violation of plaintiff's constitutionally guaranteed rights. The balance of that decision, apart from the effect on plaintiff and its officers, is that the children of Puerto Rico will lose on an extremely meritorious effort to afford them the opportunity to have *their* museum. Many will forever lose that opportunity because Defendants' actions will ensure that they will become adults by the time when, and if, the Museum is eventually built.

9.69 Defendants' tactics are not unprecedented. One of those examples is the Art Museum of Puerto Rico

("MAPR") Defendants were successful in securing the dismissal of the President of the Board of Directors of the MAPR, Mr. Marcos Rodríguez-Emma, by cutting off funds until he resigned. Mr. Rodríguez-Emma, like Ms. Guillén, is a well known NPP member.

9.70 The Children's Museum and the Museum of Art share the distinction of being run by private entities. They also share the unenviable distinction of having been the subject of politically motivated takeover attempts by Defendant Calderón, Defendant Agosto Alicea and, at a minimum, the GDB. In doing so, Defendants have sought to dictate who could be an officer or Board Member of those private entities.

9.71 The MAPR was constructed by the GDB and, like the Children's Museum, was always intended to be run by a private, non-profit entity.

9.72 As is the case with the Children's Museum, the Members of the Board Directors of the MAPR were appointed by the Governor.

9.73 Since the MAPR had been completed, or substantially completed by the time Defendants assumed power, Defendants Calderón, Agosto Alicea and GDB could not deny the payment of construction costs, as they have done with the Children's Museum.

9.74 Defendants Calderón, Agosto Alicea and GDB did refuse to provide operating funds to the MAPR (again, as they have done with the Children's Museum) while Mr. Marcos Rodríguez-Emma was President of the Board of Directors for the same arbitrary, capricious, vindictive and discriminatory reasons as those against the plaintiff and Ms. Guillén. Mr. Rodríguez-Emma was, a former cabinet member of the Rosselló administration and a member of the NPP, similar to the situation of many PRISMA-Private officers.

9.75 Defendants Calderón, Agosto Alicea and GDB, through Defendant Agosto Alicea, forced the resignation of Mr. Rodríguez-Emma as President as a condition to releasing already appropriated funds. Mr. Rodríguez-Emma resigned as President of the Board but the funds were still not provided. They were not provided for the simple reason that Mr. Rodríguez-Emma had been elected Treasurer of the Board by his fellow Board members.

9.76 Defendants Calderón, Agosto Alicea and GDB's arbitrary, capricious, vindictive and discriminatory wishes were not satisfied until Mr. Rodríguez-Emma was forced to resign from the Board altogether. The minute Mr. Rodríguez-Emma was forced out of the Board altogether, Defendants Calderón, Agosto Alicea and GDB allowed the operating funds to be disbursed to the MAPR and the private entity operating the MAPR allowed to go on conducting the business for which it was incorporated.

9.77 It is important to note that, upon information and belief, the funds the MAPR required and were denied to them had been appropriated in the FY 2000-2001 budget but had not been disbursed before the elections or Calderón's inauguration. This is painfully similar to the situation faced by plaintiff.

9.78 As part of Defendant's concerted efforts, they have attempted and, to a substantial extent, succeeded in turning plaintiff's own contractors against plaintiffs.

9.79 Upon information and belief, Mr. Agosto Alicea met with Mr. José López, President of Constructora Santiago Corp. ("CSC"), the main contractor to the Project.

9.80 Upon information and belief, Mr. López asked Mr. Agosto Alicea whether he should stop working on the Project and whether the GDB would pay the pending construction certifications, which amounted to close to $5 million.

9.81 Upon information and belief, Defendant Agosto Alicea told Mr. López to continue in the Project and assured him that CSC would be compensated for its work.

9.82 Upon information and belief, Mr. Agosto Alicea also told Mr. López that he understood that the contract with CSC was valid and, specifically, asked Mr. López not sue the Government for collection of monies. Presumably, the implied threat was that if he did, he would face the same fate PRISMA-Private faces.

9.83 After that meeting Mr. López informed Ms. Guillén of the content of the conversation with Defendant Agosto Alicea.

9.84 As time went by and no payment was received, on April 10, 2001, CSC, through its legal representatives made a written request for payment, addressed to Defendant Agosto Alicea, Defendant Pesquera, and Mr. Vélez, as President of PRISMA-Private.

9.85 Upon information and belief, Mr. López talked, about this subject, on at least a second occasion with Defendant Agosto Alicea.

9.86 After this second conversation between Defendant Agosto Alicea and CSC's representatives, the latter turned against PRISMA-Private.

9.87 As a result of Defendant's concerted efforts, CSC expressed a new adversarial animus towards the Project and towards plaintiff in a letter dated May 23, 2001. The letter was copied to Mr. Vélez, as President of PRISMA-Private's Board, and stated CSC's support to the legal action taken in state court by the Tourism Company.[18]

9.88 The letter from counsel to CSC was addressed to the Tourism Company's legal counsel.

9.89 Before the intervention of Defendant Agosto Alicea with CSC, PRISMA-Private had not experienced differences with its contractor at the level of having the contractor's legal representative write a letter in terms that were clearly against the continuance of the Project by PRISMA-Private.

9.90 Causing CSC to write this letter constitutes an additional element in the arbitrary, capricious, vindictive and politically discriminatory scheme devised by Defendants to harm plaintiff.

9.91 Defendants are aware of the political affiliation of Mr. Vélez and, more important than that, of Mr. Vélez's political activism as a citizen.

9.92 Defendants are aware of the fact that Mr. Vélez served as Executive Director of the Tourism Company during the NPP administration of Hon. Luis A. Ferré Aguayo.

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[18] *See* **Exhibit XI**.

9.93 Defendant Calderón and Agosto Alicea are aware of the fact that Mr. Vélez has been a political strategist to the NPP, and that he has led and/or supported political campaigns for NPP candidates in the past.

9.94 Mr. Vélez has directed twice the NPP campaign for the election of that party's candidate for the position of P.R. Resident Commissioner to the U.S. Congress.

9.95 Mr. Vélez is a former Finance Director of the NPP.

9.96 Mr. Vélez is a former NPP campaign chairman for the race for the San Juan City mayoralty, when Hon. Baltasar Corrada del Río was the NPP candidate for that position.

9.97 Mr. Vélez led a successful campaign for then candidate Corrada del Río, who won the elections over PDP candidate Victoria Muñoz Mendoza.

9.98 Upon information and belief, Defendant Agosto Alicea worked in the PDP campaign and/or supported the candidacy of defeated candidate Muñoz Mendoza.

9.99 Defendant Agosto Alicea and Mr. Vélez have been political adversaries in the past insofar they have been both working in opposing political teams during the campaigns.

9.100 Defendants are aware of the political background of Ms. Guillén.

9.101 Ms. Guillén worked in the NPP governorship re-election campaign of former Governor Carlos Romero Barceló.

9.102 Ms. Guillén worked in the Office of the First Lady during 1982 through 1984, while there was an NPP administration. She worked as an auxiliary advisor in charge, among other things, of executing First Lady Kate Donelly de Romero's initiative to help the handicap [sic] children.

9.103 Ms. Guillén was also involved in the mayoralty race of Mr. Corrada del Río, who won over then PDP candidate, Hon. Victoria Muñoz Mendoza.

9.104 Ms. Muñoz Mendoza was the PDP candidate supported by Defendants.

9.105 Defendants Calderón and Agosto Alicea actively supported Ms. Muñoz Mendoza and/or donated sums of money for the latter's campaign.

9.106 Ms. Guillén worked in the NPP administration of former Mayor of San Juan, Hon. Baltasar Corrada del Río for two years.

9.107 After she ceased working in the San Juan City Hall, Ms. Guillén worked as account executive in the advertising agency Joe Franco & Assoc. from 1986 through 1991. As part of her responsibilities in the agency she was assigned as the liaison with the NPP and assisted Mr. Franco in the developing of the advertising campaign for that party.

9.108 She also participated in the governorship race of former NPP candidate Hon. Baltasar Corrada del Río.

9.109 In 1990 she became involved in a movement called "Cruzada Estadista", an educational initiative lead [sic] by Dr. Pedro Rosselló, prior to him becoming the NPP candidate.

9.110 Defendants are aware of Ms. Guillén's active involvement in NPP politics.

9.111 All active members of PRISMA-Private Board of Directors were appointed by former Governor Rosselló and all have NPP ties.

9.112 The facts concerning the appointment by Rosselló of the active members of the Board, as well as their NPP ties are known by Defendants.

9.113 Defendants Agosto Alicea, Pesquera and Pagán are members of the Popular Democratic Party and/or respond to the political agenda and/or desires of Defendant Calderón, President of the PPD. [sic]

9.114 Defendants Agosto Alicea, Pesquera and Pagán have participated in PDP activities and/or fund raisers.

9.115 Defendants Agosto Alicea, Pesquera and Pagán have donated sums of money to the PPD. [sic]

9.116 During the week of the 18th of June of 2001, and prior to the filing of this action, plaintiff made various attempts to set up a meeting with Defendant Agosto Alicea, through Mr. Juan Bauzá and Mr. José E. Vélez, to settle this controversy.

9.117 The original Complaint in the instant case was filed on June 22, 2001. On July 2, 2001, José Pagan, in his capacity as Executive Director of the Children's Trust Fund entered into an Amendment of the Service Contract for the provision of computers to schoolchildren of Puerto Rico with the Secretary of Education. The original contract provides that it shall not be amended **without the prior, written approval of the Children's Trust Fund Board.** Mr. Pagán had not consulted with the Children's Trust Fund Board prior to amending the contract, and he did not have their written approval.

9.118 As of this date, all the monies – $250 million have been spent. The money was spent before Mr. Pagan went to the Board to seek approval for the amendments. The money was spent on, *inter alia,* licenses for Microsoft, ($25 million) although bond counsel had informed Prisma Zona officials that the IMAX licenses could not be categorized as capital improvements, the only type of expenses permissible from bond proceeds.

9.119 On information and belief[19], the bond money was also spent on payroll for existing operations, in contravention of the regulations of the Internal Revenue Service for bond proceeds.

9.120 The information provided to bond counsel regarding the proposed amendments to the service contract for the Department of Education contain a number of misrepresentations. For one, the information states that there is no legal or financial relationship between the Office of Budget and Management and the Department.

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[19] We are forced to allege this matter on information and belief because, although Mr. Pagan was the defendant who produced the documents regarding the Amendment, when questioned about those very documents, he testified that he did not know how the money had been spent.

For another, the document also states that there is no one who can remove the head of the beneficiary entity – the Secretary of Education – without cause. Of course, the Governor can remove the Secretary of Education without cause. The document produced by defendants did not have the signature of the Approving Official.

9.121 Since defendants realize that their refusal to honor their commitments to the beneficiary entities violate [sic] the Children's Trust Law, it is their intention to change the law so that they can use the Tobacco Settlement Money for any purpose. On information and belief, defendants attempted to change the law prior to the August 20, 2001, so that this Court would not be able to provide Prisma Zona with a relief.

9.122 On July 11, 2001, defendant Agosto Alicea sent a letter to counsel for the Governor attaching a draft bill which contained language about using the Children's Trust Fund money for children or health **or any other purpose.**

9.123 Mr. Pagan testified that one of the purposes being considered for the Children's Trust Fund monies was the subsidization of the Water Company.

9.124 Mr. Pagan further testified that he spoke with staff from the Governor's office in an effort to get the proposed legislation introduced in the special session, which was completed today.

9.125 Counsel for defendants have represented that diverting these funds from children to other uses is essential to the success of the Calderón administration.

9.126 Defendants are determined to hide their illicit motives from public view. After initially waiving the objection, counsel for defendants have, on information and belief on the direct orders of the Governor or her staff or both, objected to the disclosure of any information regarding their attempts to amend a law that was passed unanimously in both the House and the Senate for the benefit of the children of Puerto Rico.

## IV. FIRST CAUSE OF ACTION: VIOLATION OF PRISMA'S RIGHTS UNDER THE FIRST, FIFTH AND FOURTEENTH AMENDMENTS AND 42 U.S.C.A. §1983 BY ALL DEFENDANTS

10.1 Plaintiff reproduces and reaffirms as if alleged herein each and every one of the preceding allegations.

10.2 Plaintiff is a person authorized to seek redress for the constitutional and statutory violations alleged herein.

10.3 The approval of the $60 million grant, and the additional $17.5 million grant, to PRISMA-Private by the Children's Trust Fund constitutes a valuable government benefit. While the Children's Trust Fund can grant and disburse monies to various entities from the private sector, Government officials such as defendants Calderón, Agosto Alicea, Pesquera and Pagán cannot deny the disbursement of previously approved funds to plaintiff on the basis of the political affiliation, the exercise of their right of freedom of expression and freedom of association of its directors and executives. Such action violates the First Amendment to the United States Constitution, as made applicable to Puerto Rico by the Fifth and Fourteenth Amendments to the United States Constitution.

10.4 In a concerted manner, defendants Calderón, Agosto Alicea, Pesquera and Pagán have taken deliberate steps, under color of Puerto Rico law, policy, practice, custom and usage to retaliate against PRISMA-Private for activities protected by the First, Fifth and Fourteenth Amendments.

10.5 The acts and omissions committed by the defendants against PRISMA-Private pursuant to Puerto Rico policy and practice were undertaken in bad faith and motivated by an intent to penalize PRISMA-Private due to the composition and political affiliation of the members of its Board of Directors and to their efforts to continue a project which was conceptualized and created by the previous administration of Governor Pedro Rosselló. Retaliating against PRISMA-Private on a partisan basis violates clearly established law under the First, Fifth and Fourteenth Amendments to the United States Constitution and the Civil Rights Act of 1871, 17 Stat. 13, as amended, 42 U.S.C.A. 1983.

10.6 The timing of the acts and omissions committed by defendants Calderón, Agosto Alicea, Pesquera and Pagán against PRISMA-Private pursuant to Puerto Rico policy and practice, coupled with the direct evidence of persecution and discrimination against PRISMA-Private were substantial and/or motivating factors behind the punitive treatment of PRISMA-Private in violation of the First, Fifth and Fourteenth Amendments to the United States Constitution and the Civil Rights Act of 1871, 17 Stat. 13, as amended, 42 U.S.C.A. 1983.

10.7 The acts and omissions committed by the defendants against PRISMA-Private pursuant to Puerto

Rico policy and practice were undertaken with maliciousness and with wanton recklessness for PRISMA-Private's protected rights. Such conduct was motivated by illegitimate political reasons, and stemmed from improper considerations and illegal motives.

10.8 As a result of the foregoing acts and omissions, PRISMA-Private has been and continues to be irreparably harmed and unconstitutionally punished for exercising its right to associate with and employ people of a particular party affiliation; to request the disbursement of its operational and capital expenditure funds already approved and assigned by the Government of Puerto Rico; its liberty rights as recognized by *Paul v. Davis*, 424 U.S. 693 (1976) by the making of false or misleading statements, and to exercise its right to freedom of expression and freedom of association.

10.9 PRISMA-Private has suffered substantial monetary damages as a result of Defendants unconstitutional actions as described above.

10.10 Because defendants' unconstitutional conduct is continuous, until this conduct is enjoined, PRISMA-Private will be subject to further unconstitutional governmental reprisal and coercion, in violation of the First, Fifth and Fourteenth Amendments and its right to freedom of expression and freedom of association.

## V. SECOND CAUSE OF ACTION: VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE CONSTITUTION

11.1 Plaintiff reproduces and reaffirms, as if alleged with full force and effect herein, each and every one of the preceding allegations.

11.2 As previously stated, in a press conference held on May 7, 2001, Defendant Agosto Alicea declared that a total of 106 proposals from the private and public sectors had been approved by the Children's Trust Fund. Defendant Agosto Alicea also stated that funds for public (government) proposals would not be disbursed, *and while acknowledging that PRISMA's funds had already been approved, defendant Agosto Alicea stated that proposals from the private sector would receive the corresponding funds, except for PRISMA.*

11.3 By withholding PRISMA-Private's operational and capital expenditure funds due to discriminatory reasons, the defendants have prejudiced PRISMA-Private and, upon information and belief, benefited the other private entities which received or are in the process of receiving, the grants approved by the Children's Trust Fund.

11.4 The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within a state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.

11.5 Equal protection claims can be brought by those singled out for discriminatory treatment even if they are a class of one and not a victim of discrimination based on group characteristics. *Willowbrook v. Olech*, 120 S.Ct. 1073 (2000) (per curiam).

11.6 Defendants irrational and arbitrary actions of singling out PRISMA-Private from the private entities who were granted and received funds from the Children's Trust Fund do not serve a legitimate government interest and solely respond to a discriminatory animus.

11.7 Thus, the defendants' actions violate plaintiff's rights under the equal protection clause of the Fourteenth Amendment of the Constitution of the United States. Accordingly, the defendants should be ordered to disburse PRISMA-Private's operational and capital expenditure funds, and it is so required herein.

## VI. THIRD CAUSE OF ACTION: THE TAKING OF PROPERTY WITHOUT DUE PROCESS

12.1 Plaintiff reproduces and reaffirms as if alleged herein each and every one of the preceding allegations.

12.2 As explained above, the approval of the $60 million grant and the additional $17.5 million grant to PRISMA-Private by the Children's Trust Fund, constitutes plaintiff's property. These funds are all legally owned by plaintiff under existing law. Defendant's obstinate refusal to release those funds constitutes an illegal and unconstitutional taking of plaintiff's property without affording plaintiff the Due Process of Law guaranteed by the Fifth Amendment to the United States Constitution.

12.3 PRISMA-Private has suffered substantial monetary damages as a result of defendants unconstitutional actions as described above.

12.4 Because defendants' unconstitutional conduct is continuous, until this conduct is enjoined, PRISMA-Private will be subject to further unconstitutional governmental reprisal and coercion, in violation of the Fifth Amendment of the United States Constitution.

## VI. FOURTH CAUSE OF ACTION: THE CONSTRUCTIVE TRUST

13.1 Plaintiff reproduces and reaffirms, as if alleged with full force and effect herein, each and every one of the preceding allegations.

13.2 As noted above, the Children's Trust Fund issued the tax exempt Series 2000 Bonds with the specific purpose of benefiting PRISMA-Private, among other beneficiaries.

13.3 The Tax Certificate accompanying the Prospectus states specifically that "The Issuer has determined to issue the Bonds and apply the proceeds thereof and the investment earnings hereon to (a). . . . (b) make a grant to Prisma Zona Exploratoria de Puerto Rico, Inc. ("Prisma") which will be used for the acquisition, construction, and equipping of a children's museum in Isla Grande, Santurce, Puerto Rico (the "Prisma Project") to be owned and operated by Prisma."

13.4 Defendants' stated intention of moving the Children's Museum to a different locale violates the aforementioned condition.

13.5 Defendants' refusal to release the funds for approved certifications of work performed also violates the aforementioned condition.

13.6 The Tax Certificate also states in Part B Section 1(a)(iv), that $349,050,000.00 of such proceeds will be deposited into the accounts of the issuer (the Children's Trust Fund) with GDB established for each of the Department of Education Project, the Prisma Project, and the Initiative Project.

13.7 PRISMA-Private is the beneficiary of the issuance of the bonds and therefore is the beneficiary of a constructive trust resulting from the Children's Trust issuance of the bonds in question. *See Corporación Insular de Seguros v. Reyes Muñoz*, 849 F. Supp. 126 (D.P.R. 1994) and *Ruiz v. Ruiz*, 61 P.R.R. 794 (1943).

13.8 As a beneficiary of the constructive trust created by the Children's Trust, PRISMA-Private is entitled to an order from this Honorable Court requiring the Children's Trust to comply with the terms of the Trust Agreement and the accompanying Tax Certificate.

## VII. FIFTH CAUSE OF ACTION: REQUEST FOR PRELIMINARY AND PERMANENT INJUNCTION

14.1 Plaintiff reproduces and reaffirms, as if alleged with full force and effect herein, each and every one of the preceding allegations.

14.2 The withholding by defendants of PRISMA-Private's operational and capital expenditure funds has deprived PRISMA-Private of its constitutional rights, as it is in direct violation of the First, Fifth and Fourteenth

Amendments protecting the right of freedom of expression and freedom of association, as well as the Equal Protection Clause of the Constitution of the United States.

14.3 Plaintiff has suffered and will continue to suffer grave and irreparable harm as a result of the continuous violation of its civil rights, and is therefore entitled to an equitable remedy to cease such damaging acts.

14.4 Plaintiff cannot adequately calculate the economic losses related to the violation of its constitutional rights. Its construction plans have been halted, its capacity to comply with its creditors and/or contractors has been curtailed, and the project development has been unduly paralyzed due to Defendants' unconstitutional actions. In addition, its ability to effectively raise funds and process grant proposals has been chilled.

14.5 Because of the need to continue with the Project, PRISMA-Private is at a crux of complying with its obligations, and continuing with the construction and good business relationship with its contractors and advisors. The discriminatory withholding of PRISMA's operational funds frustrates this opportunity and has placed PRISMA-Private in an extremely fragile position.

14.6 Plaintiff's averments show a substantial probability of success on the merits based upon the open violation of both First, Fifth and Fourteenth Amendment and the Equal Protection Clause of the Constitution of the United States. The Defendant's stated actions allow for no other conclusion.

14.7 The balance of interests in this case favors plaintiffs, since they are suffering irreparable damages while on the other hand there exists no true or valid governmental purpose to withhold PRISMA-Private's funds. The government's interest in arbitrarily withholding PRISMA-Private's funds is clearly outweighed by the plaintiffs' interest in exercising their constitutional rights.

14.8 The public interest is best served by requiring defendants to comply with their legal obligations. Since the ends to which the Trust is created are expressly declared in the Law to be in the public interest. According to the Law, the exercise of those powers by the Trust constitutes an essential governmental function.

14.9 There is no public interest in permitting defendants to strangle Prisma-Private and destroy a project that benefit [sic] the children of Puerto Rico enormously.

14.10 Wherefore, it is necessary that this Honorable Court order the defendants to disburse PRISMA's operational and capital expenditures funds.

14.11 Plaintiffs request the following:

> a. The issuance of a preliminary and permanent injunction, pursuant to Rule 65 of the Federal Rules of Civil Procedure, requiring Defendants including their officers, agents, employees, servants, representatives, attorneys, and other person acting on their behalf to release the funds approved and certified, pay all future certifications filed in compliance with the procedures established by the Trust, and pay operating costs as approved by the Children's Trust.
>
> b. If this Honorable Court finds that defendants have waived their right to request *Younger* abstention, or if this Honorable Court finds that the local court action was brought in bad faith, and/or to harass plaintiff and/or under other

unusual circumstances constituting an exception to the *Younger* doctrine, that it issue a preliminary and permanent injunction against the Executive Director of the Tourism Company enjoining him from prosecuting Civil Action KAC 01-3380 (506) before the San Juan Superior Court, or to otherwise seek to annul or modify the Transfer Agreement before any other court of law and ordering him to comply with its terms.

c. The issuance of a preliminary and permanent injunction, pursuant to Rule 65 of the Federal Rules of Civil Procedure ordering the Defendants including their officers, agents, employees, servants, representatives, attorneys, and other person acting on their behalf to cease and desist actions and omissions aimed at implementing the politically discriminatory scheme devised by the Defendants.

d. To order defendants to pay punitive damages because their actions were taken in bad faith and out of malice.

e. To grant plaintiffs the costs and attorneys' fees incurred to bring forth this Complaint, pursuant to 42 U.S.C. 1988.

f. To grant such other relief as this Honorable Court may deem just and proper.

g. In compliance with Rule 65(b), a certificate of notice given to Defendant is hereby attached to the Complaint.

**WHEREFORE**, it is respectfully requested that this Honorable Court enter a preliminarily and permanent injunction enjoining defendants from withholding PRISMA-Private's operational funds and capital improvement funds because it is unconstitutional; and that plaintiffs be granted their damages and such further relief as to this Honorable Court may deem just and proper.

Respectfully submitted.

At San Juan, Puerto Rico, this 17th day of June, 2001.

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